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## Empire Forgotten: The United States's Colonization of Puerto Rico

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## EMPIRE FORGOTTEN: THE UNITED STATES'S COLONIZATION OF PUERTO RICO

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*One of our challenges is to ensure that hope and opportunity are defining characteristics of all Americans.*

*This was the challenge 30 years ago, when the great movement reshaping world politics was the end of colonialism. John Kennedy celebrated the "desire to be independent" as the "single most important force in the world." Eventually this movement revealed its power from Asia to Africa to South America.*

*The problem with imperialism was not just its economic exploitation. It was its influence on culture. It undermined traditional ways and institutions. It was inconsistent with human dignity.*

*Why? Because imperialism rewarded passivity and encouraged dependence. It required citizens to live by the rules of a distant elite. It demanded people be docile in the face of a system that they could not change. It was an attack, not just on national sovereignty, but on national character.<sup>1</sup>*

### I. INTRODUCTION

THESE poignant truisms concerning colonialism are loud testaments of the United States's stated convictions concerning the evils bestowed upon those ruled by an imperialistic government.<sup>2</sup>

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\* Associate Professor of Law, St. Thomas University, B.A. 1985, Lehman College, J.D. 1988, University of Wisconsin. The author dedicates this work in loving memory to his mother, Carmen Hernandez. The love, inspiration and courage Ms. Hernandez gave to the author and his siblings calls for this acknowledgment and so much more.

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1. 141 CONG. REC. S7245 (daily ed. May 23, 1995) (statement of Sen. Ashcroft) (introducing welfare reform legislation to move United States's underclass "from governmental dependence to economic independence").

2. See H.R. Con. Res. 154, 104th Cong., 142 CONG. REC. H5316 (daily ed. May 21, 1996) (enacted) (congratulating Taiwan on its first democratic presidential election and pledging United States's continued commitment to moving nations

These statements, however, are equally loud testaments of the United States's hypocrisy with respect to its island dependencies, particularly the Commonwealth of Puerto Rico.<sup>3</sup> The above-quoted evils of colonialism professed in Congress ring true when analyzing the historical relationship between the United States and Puerto Rico. Notwithstanding the United Nations (U.N.) General Assembly's declaration that the 1990s shall be the decade for the eradication of colonialism<sup>4</sup> and the conventional thinking that *de jure* colonialism throughout the world is nearing its end,<sup>5</sup> the colonial

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toward freedom and democracy); 142 CONG. REC. S4982-83 (daily ed. May 13, 1996) (statement of Sen. Simon) (celebrating hundredth anniversary of Ethiopian victory over Italian colonialists at Battle of Adwa); 142 CONG. REC. E591 (daily ed. April 19, 1996) (statement of Rep. Burton) (congratulating Sikhs on Vaisaakhi Day, birthday of Sikh nation); 142 CONG. REC. S2420-21 (daily ed. March 20, 1996) (statements of Sen. Pell and Sen. Feingold) (celebrating forty years of Tunisian independence); 141 CONG. REC. S8831-33 (daily ed. June 21, 1995) (statement of Sen. Simon) (calling for greater support for fledgling democracies in Africa); 140 CONG. REC. E1170 (daily ed. June 9, 1994) (statement of Rep. Underwood) (commemorating 96 years of Philippine independence); *cf.* 141 CONG. REC. H8591-93 (daily ed. Sept. 6, 1995) (statement of Rep. Faleomavaega) (condemning France's nuclear testing because of effects on Tahiti).

3. See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 447 (1992) (noting U.S. flag flies over dependent territories—Puerto Rico, American Samoa, Guam, Northern Mariana Islands, U.S. Virgin Islands—not incorporated into federation of states); *cf.* EMILIO PANTOJAS-GARCIA, *DEVELOPMENT STRATEGIES AS IDEOLOGY* 3 (1990) (suggesting that development strategies are not neutral policies intended to benefit all of society but rather ideological representations of particular political class's mode of capital accumulation and citing RICARDO KESSELMAN, *LAS ESTRATEGIAS DE DESARROLLO COMO IDEOLOGIAS* 11, 15 (1973)). The debate in both Puerto Rico and the U.S. Congress during the last century, recent congressional efforts that attempt to address Puerto Rico's colonial dilemma and Congress' dismantling of Puerto Rico's economic development incentive program beg for a critical historical and economic review of U.S. policy towards Puerto Rico. See generally, JAMES L. DIETZ, *ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT* 3-239 (1986) (examining Puerto Rico's political economic history from Spanish colonialism to U.S. "Operation Bootstrap"). Dietz describes Operation Bootstrap, the U.S. development program for Puerto Rico, as "a monument not to economic progress, but to the cost and danger inherent in a development program based upon capital-intensive, foreign-owned, vertically integrated, and export-oriented corporate extension." *Id.* at 309. For a further discussion of the development and subsequent dismantling of Puerto Rico's economic development incentive program by the United States, see *infra* notes 403-18 and accompanying text.

4. See G.A. Res. 43/47, U.N. GAOR, 43d Sess., Supp. No. 49, at 48, U.N. Doc. A/43/49 (1989).

5. See *id.*; see also Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1289 (1991) (noting that today less than three million people live in colonial and other dependent territories); see also Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 263 (1996) (asserting decolonization process has reached or is nearing its end). In actuality, in Puerto Rico alone, over 3.7 million individuals live in a colonial setting. See BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTI-

nature of the United States-Puerto Rico relationship is a matter that even members of Congress do not deny.<sup>6</sup> Consider the following scholarly condemnation of U.S. policy, written over thirty years ago, but equally applicable today: "While the United States, because of its world position and its concern for peace and security, has been deeply involved in the process of the struggle for emancipation in the territories of other colonial powers, its own have thus far largely fallen outside the mainstream of the decolonization debate . . . ."<sup>7</sup> Furthermore, "[t]he United States can hardly ignore, or even appear to ignore, the connection between its own remnants of empire and those of the European colonial powers. We cannot preach self-determination in Africa and Asia while denying it to the peoples of our own island dependencies."<sup>8</sup>

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CAL ABSTRACT OF THE UNITED STATES 1996 810, tbl.1309 (116th ed. 1996) (showing Puerto Rico has estimated resident population of 3.819 million).

6. See 142 CONG. REC. E299 (daily ed. March 6, 1996) (statement of Rep. Young) ("After 400 years of colonial rule by Spain ended in 1898, it should not have taken another 100 years of American administration for the U.S. Congress to define the options for full and permanent self-government."); 142 CONG. REC. S284 (Jan. 22, 1996) (statement of Sen. Simon) ("The reality is that commonwealth status . . . is simply another form of old-fashioned colonialism."); 137 CONG. REC. H4540 (daily ed. June 13, 1991) (statement of Rep. Serrano) ("Puerto Rico is one of the very few remaining territories in the entire world where the vestiges of colonialism still prevail."); Jose Julian Alvarez Gonzalez, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 309 (1990) ("However much it may try to deny it, the United States has a colonial problem in Puerto Rico.").

7. DAVID W. WAINHOUSE, REMNANTS OF EMPIRE: THE UNITED NATIONS AND THE END OF COLONIALISM 115 (1964). Recognizing that "the attainment of self-government, difficult though it may be, is less difficult than its exercise," Wainwright notes that "[l]aying the political, economic and social foundations for this choice is a time-consuming and costly process." *Id.* at 134. Although Wainwright hoped that the United States-Puerto Rico Commission on the Status of Puerto Rico, established in 1964, would provide the Puerto Rican people with "an opportunity to express their preference for a redefined commonwealth, statehood, or independence," thirty-three years later they are still denied their right to a binding plebiscite. See *id.* at 127 (discussing hopes for commission's work). This shameful situation is highlighted by the attention paid to the District of Columbia's calls for statehood. See generally Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1659 (1991) (noting D.C.'s statehood movement has drawn national attention). The cries of 600,000 Washington D.C. residents have received congressional and media attention while the colonial dilemma of 4 million U.S. citizens in Puerto Rico has largely gone unnoticed. Compare BUREAU OF THE CENSUS, *supra* note 5, at 29, tbl.27 (listing District of Columbia with 1995 estimated resident population of 554,000 people), with *id.* at 810, tbl.1309 (listing Puerto Rico with 1996 estimated resident population of 3.819 million people).

8. WAINHOUSE, *supra* note 7, at 130. Wainhouse considered the United States to possess only four remaining dependencies: the Pacific Islands Trust Territory and the three self-governing territories of Guam, American Samoa and the American Virgin Islands. See *id.* at 115-16 (stating Puerto Rico's commonwealth status precludes charges that it is American colony).

More recently, Federal Judge Juan R. Torruella described the U.S. policies towards Puerto Rico as "archaic notions" that serve to keep "a class of several million . . . citizens in a subservient condition *ad infinitum*, with less rights than even aliens who reside in the United States, [a relationship that] makes no sense and cannot today be sustained on legal, moral or logical grounds."<sup>9</sup>

This Article tells a story of two countries: the first, a world power through its noble proclamations concerning human rights, led the charge for the recognition of a people's right to choose their political and socio-economic future; the second, because of its domination by the first, has been unable to have its people choose their political and socio-economic future.<sup>10</sup> In analyzing this relationship, this Article demonstrates how the United States, by denouncing imperialism while at the same time quietly enjoying its benefits, resembles the "colonizer who refuses."<sup>11</sup>

Unlike some of the learned works in the dynamic critical race movement, this piece does not declare the beginning or existence of a "Puerto Rican Moment."<sup>12</sup> In fact, after a century of coloniza-

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9. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 268 (1988) (arguing Supreme Court should vacate decisions which permit separate and unequal treatment of U.S. citizens living in Puerto Rico); see also Jose A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 464 (1986) (reviewing TORRUELLA, *supra*) (stating that territorial assimilation doctrine—which permits Congress to treat territories differently than states—foretells resolution of debate over Puerto Rico's permanent status). The author respectfully acknowledges both Judge Torruella and Judge Cabranes for not only being role models to the people of Puerto Rico, but also for eloquently advocating an end to Puerto Rico's colonization.

10. While this Article condemns, as both immoral and illegal, the current United States-Puerto Rico relationship, it does not take a position on statehood versus independence. It is presumptuous for a writer living in the United States to "tell" the Puerto Rican people what political choice they should make. Indeed, it is the people living in Puerto Rico who must be allowed to choose their own political future free of external influence.

11. See generally ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 19-44 (1965) (describing hypothetical colonizer who disagrees with principles, methods and effects of colonization, but nonetheless reaps rewards stemming from colonialism).

12. See generally Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245-46 (1993) (announcing "Asian-American Moment," marked by increasing presence of Asian-Americans in legal academy who are beginning to remake old legal doctrines); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 40 (proclaiming "African-American Moment" in 1991 when different and blacker voices will remake old legal doctrines). Critical race theory is "a form of oppositional scholarship[; it] challenges the universality of white experience-judgment as the authoritative standard that binds people of color and normatively measures, directs, controls, and regulates the terms of proper thought, expression, presentment, and behavior." John O.

tion, this Article questions whether the people of Puerto Rico will ever have their moment. Instead it asks the legal academy, as well as the Puerto Rican and American citizenry, to recognize that the Puerto Rican people have been denied the basic human right to control their own destiny. While the author is not optimistic as to his ability to remake American colonial doctrines, this Article is an indictment of that part of the U.S. imperialistic history that many have forgotten.<sup>13</sup> This Article will compare the United States's proclamations, both to the Puerto Rican people and the international community, with its actual practice with respect to Puerto Rico.<sup>14</sup> From the perspective of a member of a "resistance culture,"<sup>15</sup> the author calls upon the United States as the ruler of Puerto Rico "to live up to the ideals which [the ruler has] transmitted to [the Puerto Rican people] and proclaimed as their own."<sup>16</sup>

In Part II of this Article, the United States's integral role in the development of the fundamental principle of self-determination will be examined to illustrate the unjust nature of the United States-Puerto Rico relationship and the indefensible position of the

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Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129, 2160 (1992).

13. Cf. Apology Bill to Native Hawaiians, Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513 (1993) (recognizing and apologizing to native Hawaiians for participation of U.S. agents and citizens in overthrow of Hawaiian government and subsequent deprivation of native Hawaiians' right to self-determination). In stark contrast, the United States continuously denies its colonial relationship with Puerto Rico and endeavors to avoid international scrutiny of the economic, social and political conditions in Puerto Rico. For a further discussion of the United States's efforts to avoid international scrutiny regarding its relationship with Puerto Rico, see *infra* notes 167-95 and accompanying text.

14. See *U.S.-Puerto Rico Political Status Act: Hearing Before the Subcomm. on Native Am. & Insular Affairs of the Comm. on Resources*, 104th Cong. 7 (1996) (statement of Carlos Romero-Barceló, Resident Commissioner from Puerto Rico) [hereinafter *1996 Hearings*] ("Our nation cannot continue to preach and, at times, attempt to enforce democracy throughout the world while at the same time it continues to disenfranchise and deny political participation and economic equality to 3.7 million of its own citizens.").

15. See EDWARD W. SAID, *CULTURE AND IMPERIALISM* 209-20 (1994) (stating part of decolonization process is cultural or ideological resistance which develops as native people begin to rechart their cultural territory by rediscovering and repatriating their national culture and language suppressed by imperialistic process); see also Angela P. Harris, *Foreward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 763 (1994) (noting Said's observation that from formerly colonized people there has emerged "resistance culture" that questions dominant culture's norms).

16. THE RELEVANCE OF INTERNATIONAL LAW 209 (Karl Deutsch & Stanley Hoffmann eds., 1971) (stating principles insisted upon by anticolonialists, including self-determination, are derived from principles of higher law by which ruler itself professes to live).

United States with respect thereto.<sup>17</sup> Part II will examine the principle in detail and its adoption by the United States.<sup>18</sup> Part II will also discuss the attributes of a colony.<sup>19</sup> Parts III and IV will analyze how the United States "required [U.S.] citizens [in Puerto Rico] to live by the rules of a distant elite."<sup>20</sup> Part III will explore how the United States, despite its purported support for the principle of self-determination, has colonized Puerto Rico.<sup>21</sup> More specifically, Part III will review Puerto Rico's military<sup>22</sup> and civilian governments.<sup>23</sup> After examining the reasons the United States treats Puerto Rico as a colony,<sup>24</sup> Part III charts the means by which the United States has attempted to elude the colonizer label through

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17. See *Puerto Rico Status Plebiscite: Joint Hearing Before the Subcomm. on Native Am. & Insular Affairs of the Comm. on Resources & the Subcomm. on the W. Hemisphere of the Comm. on Int'l Relations*, 104th Cong. 13 (1995) (statement of Rep. Serrano) [hereinafter *Plebiscite Joint Hearing*] (objecting to U.S. policies and urging subcommittees to honor commitments). Representative Serrano stated:

I am part of a government which promotes the right of people around the world to a full and free expression of their political aspirations, but blatantly denies it to the 3.7 million United States citizens residing in our Puerto Rican colony. . . .

. . .  
I urge these subcommittees to adhere to our commitments, to give meaning to our international pronouncements, to reclaim our rightful place as a moral leader.

We have no credibility in the world if we fail to practice what we preach, if we continue to bear the shame of denying a people the basic human right of political self-determination.

*Id.*; accord Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 79 (1995) ("Although the United States has invoked the principle of self-determination many times in pursuit of its own goals . . . the United States has a poor history of allowing peoples within its territories to invoke the principle against itself.").

18. For a discussion of the self-determination principle, see *infra* notes 42-79 and accompanying text.

19. For a discussion of the attributes of a colony, see *infra* notes 80-88 and accompanying text.

20. 141 CONG. REC. S7245 (daily ed. May 23, 1995) (statement of Sen. Ashcroft). For a further discussion of the U.S. role in the development of the principle of self-determination, see *infra* notes 65-79 and accompanying text. For a further discussion of how the United States has dictated the rights of the Puerto Rican people including how they are governed, see *infra* notes 167-95 and accompanying text. For a further discussion of Congress's legislative inaction regarding Puerto Rico's commonwealth status, see *infra* notes 196-279 and accompanying text.

21. For a discussion of the relationship between the U.S. and Puerto Rico, see *infra* notes 89-195 and accompanying text.

22. For a discussion of Puerto Rico's military government, see *infra* notes 89-100 and accompanying text.

23. For a discussion of Puerto Rico's civilian government, see *infra* notes 101-33 and accompanying text.

24. For a discussion of the reasons the United States treats Puerto Rico as a colony, see *infra* notes 134-41 and accompanying text.



legal fictions such as the incorporation doctrine and the creation of the commonwealth status<sup>25</sup> and the half-truths repeatedly told to the international community.<sup>26</sup> Part III also tracks the evils of colonialism, addressing how imperialism in Puerto Rico has been "inconsistent with human dignity. . . [b]ecause [it has] rewarded passivity and encouraged dependence."<sup>27</sup> Finally, Part III also addresses the cultural hegemony that evolved from Puerto Rico's colonial status and demonstrates that, as long as Puerto Rico was vital to U.S. political and economic interests, the United States refused to surrender control of Puerto Rico.<sup>28</sup> Nevertheless, as Puerto Rico's strategic importance has diminished, the United States has become less interested in its colonized possession and has undermined Puerto Rico's economy by stripping it of the U.S.-based economic development incentives that were critical to Puerto Rico's economic viability.

Part IV explores Puerto Rico's attempts to gain the right to determine its own future.<sup>29</sup> Part IV discusses the 1993 plebiscite,<sup>30</sup> House Bill 3024,<sup>31</sup> Senate Bills 472 and 2019,<sup>32</sup> and House Bills 4281<sup>33</sup> and 856.<sup>34</sup>

Part V examines the consequences to Puerto Rico stemming from the United States's refusal to acknowledge its imperialist role.<sup>35</sup> Specifically, Part V examines Puerto Rico's social and polit-

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25. For a discussion of Puerto Rico's commonwealth status, see *infra* notes 142-66 and accompanying text.

26. For a discussion of United States's half-truths regarding its relationship with Puerto Rico, see *infra* notes 167-95 and accompanying text.

27. 141 CONG. REC. S7245 (daily ed. May 23, 1995) (statement of Sen. Ashcroft). For a further discussion of the evils of colonization, including political, social and economic dependence, see *infra* notes 280-418 and accompanying text.

28. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 125 ("Expansion as a permanent and supreme aim of politics is the central political idea of imperialism.").

29. For a discussion of Puerto Rico's attempts at self-determination, see *infra* notes 196-279 and accompanying text.

30. For a discussion of the 1993 plebiscite, see *infra* notes 207-24 and accompanying text.

31. H.R. 3024, 104th Cong. (1996). For a discussion of House Bill 3024, see *infra* notes 225-48 and accompanying text.

32. S. 472, 105th Cong. (1997); S. 2019, 104th Cong. (1996). For a discussion of Senate Bill 472, see *infra* notes 276-77 and accompanying text. For a discussion of Senate Bill 2019, see *infra* notes 249-62 and accompanying text.

33. H.R. 4281, 104th Cong. (1996). For a discussion of House Bill 4281, see *infra* notes 263-66 and accompanying text.

34. H.R. 856, 105th Cong. (1997). For a discussion of House Bill 856, see *infra* notes 267-79 and accompanying text.

35. For a discussion of the colonizer who refuses to acknowledge its imperialistic role, see *infra* notes 280-418 and accompanying text.

ical dependence upon the United States<sup>36</sup> and its economic dependence.<sup>37</sup> Finally, Part V discusses the potential ramifications to the United States-Puerto Rico relationship following the repeal of a tax credit that has spurred U.S. investment in Puerto Rico's economy.<sup>38</sup> Specifically, this Part will discuss how the United States, after fostering Puerto Rico's industrialization through the Internal Revenue Code's section 936 tax incentive program, which induced Puerto Rico's key political and economic forces to support the colonial regime, simply decided, unilaterally, to end that program.<sup>39</sup> This recent congressional action will likely result in dramatic economic dislocation in Puerto Rico. Part VI argues that it is time for the United States to acknowledge its colonial relationship with Puerto Rico and allow the island the right to determine its own destiny.<sup>40</sup> This Article condemns the United States for repeatedly declaring its support of the right of freedom for colonized peoples all over the world while, at the same time, denying that right for a people of color who make up its own empire.<sup>41</sup>

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36. For a discussion of the social and political dependence on the United States, see *infra* notes 280-325 and accompanying text.

37. For a discussion of Puerto Rico's economic dependence on the United States, see *infra* notes 326-402 and accompanying text.

38. For a discussion of the potential effects of the repeal of Puerto Rico's tax credit, see *infra* notes 403-418 and accompanying text.

39. See, e.g., H.R. REP. NO. 104-586, at 132 (1996) (discussing Small Business Job Protection Act of 1996, which contains section phasing out tax exemption for American businesses investing in Puerto Rico). For a further discussion of the efforts of the United States to foster economic development in Puerto Rico through Operation Bootstrap's tax incentives and subsequent efforts to dismantle those incentives, see *infra* notes 338-418 and accompanying text.

40. For a discussion of the need for the United States to allow Puerto Rico to determine its own destiny, see *infra* notes 419-47 and accompanying text.

41. Cf. ARENDT, *supra* note 28, at 158 ("Racism has been the powerful ideology of imperialistic policies since the turn of our century."). "The fact that racism is the main ideological weapon of imperialistic politics is so obvious that it seems as though many students prefer to avoid the beaten track of truism." *Id.* at 160. The colonization of people of color by the United States and other, typically European, world powers is far from a novel practice. See SAID, *supra* note 15, at 191-220 (studying West's colonization of Africa and Asia); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 314-19 (1994) (addressing United States's annexation of Hawaii); William H. Rodgers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second "Trial of the Century"*, 71 WASH. L. REV. 379, 379-81 (1996) (addressing struggle for sovereignty by Native Hawaiian people). Obviously, racism has been a consequential issue in the Puerto Rican status debate, but it is not an issue fully addressed here. For a more expansive review of the subject, see generally Ediberto Román, "The Paradox of the Alien Citizen" (Nov. 1997) (unpublished manuscript, on file with author) (examining Puerto Rican people's statutory citizenship and paradoxes it creates as these U.S. citizens are treated as foreigners).

## II. UNITED STATES-PUERTO RICO, 1898-1997-? AN INTERNATIONAL LAW CRITIQUE

### A. *The Principle of Self-Determination*

Self-determination is the basic and sacred right of all peoples to be independent and attain freedom from all forms of foreign control.<sup>42</sup> It is considered "one of the most important and dynamic concepts in contemporary international life, . . . [exercising] a profound influence on the political, legal, economic, social and cultural planes, in the matter of fundamental human rights and on the life and fate of peoples and of individuals."<sup>43</sup> Self-determination

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42. See Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 320-23 (1995) ("[Self-determination is] the 'right' of all peoples freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development."). Although it did not specifically say so, the League of Nations viewed colonies' self-determination as held in trust by "advanced nations" until undeveloped people were sufficiently "mature" to bear the responsibility of self-determination. See *id.* at 318 (discussing form of self-determination embodied in League of Nations' Mandate system). Gordon points out that self-determination is a fundamental concept that poses a significant obstacle to the United Nations imposing trusteeship on nation states in order to prevent state disintegration. See *id.* at 322-23 (concluding that only through direct consent of people can trusteeship be implemented in manner that does not contravene right to self-determination). Gordon argues that through the U.N. Charter's trusteeship system, European powers could retain their colonial territories. The trusteeship system applied to the League of Nations' Mandate Territories System (those detached from enemy states after World War II) and territories voluntarily placed in the system by the states responsible for their administration. See *id.* at 944 (citing U.N. Charter arts. 75-91). An express objective of the U.N. Charter, however, is the progressive development of trust territories toward self-government or independence. See *id.* (citing U.N. Charter art. 76(b)). Self-determination is specifically incorporated in the United Nations charter. See U.N. CHARTER art. 1, para. 2 (establishing Charter's purpose to be, in part, establishing friendly relations and economic cooperation between nations based on principles of equal rights and self-determination); *id.* art. 55 (same). Under the Charter, the ultimate objective of self-determination is the independence of all people, including those under colonial rule. See Gordon, *supra*, at 319 (noting U.N. Charter extended principle of sacred trust—responsibility of advanced nations to foster self-determination in underdeveloped people—to all peoples who had not yet attained self-government); cf. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 77 (1996) (noting self-determination is standard of legitimacy against which governments are measured). "In its most prominent modern manifestation within the international system, self-determination has promoted the demise of colonial institutions of government and the emergence of a new political order for subject peoples." *Id.* at 76.

43. AURELIA CRISTESCU, *THE RIGHT TO SELF DETERMINATION HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATION INSTRUMENTS* ¶ 679, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, U.N. Sales No. E.80.XIV.3 (1981). The inclusion in the U.N. Charter of self-determination as one of the bases of friendly relations and political, social and economic cooperation between nations "constitutes a development of historic importance, in terms both of the recognition of that principle as a binding principle of international law and of its further elaboration and impact on various aspects of the life of peoples." *Id.* ¶ 680.

not only includes the right of a people to be free from colonial rule, but also the right of a people to "freely" determine their own political status along with their cultural and socio-economic future.<sup>44</sup>

Self-determination is grounded on human rights precepts which recognize that all peoples are equally entitled to be in control of their own destinies.<sup>45</sup> The concept "derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality."<sup>46</sup> Self-determination is thus based on principles of human freedom and equality, and is, as such, fundamentally at odds with colonial rule.<sup>47</sup> In application, self-determination has been the bedrock of the

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44. See Otto Kimminich, A "Federal" Right to Self-Determination?, in MODERN LAW OF SELF-DETERMINATION 85 (Christian Tomuschat ed., 1993) ("The right to self-determination may be defined as the right of a people or a nation to determine freely by themselves without outside pressure their political and legal states as a separate entity."); (quoting Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace: Its Philosophical Background and Practical Application*, 691 REVUE DE DROIT INT'L DE SCIENCES DIPLOMATIQUES ET POLITIQUES 263 (1991)); see also Chen, *supra* note 5, at 1287 (identifying challenges facing self-determination under international law); Thomas M. Frank, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52 (1992) ("Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement."); Gordon, *supra* note 42, at 321 n.111 (discussing *Declaration on Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, ¶ 2, U.N. Doc. A/4684 (1960)); Frederic L. Kirgis, Jr., *Self-Determination of Peoples and Politics*, 86 AM. SOC'Y INT'L L. PROC. 369, 369-70 (1992) (discussing self-determination in context of international law); Oshiro, *supra* note 17, at 65-66 (noting indigenous peoples under dominion and control of United States must turn to international law for source of their right to self-determination because U.S. Constitution does not include such right).

45. See Anaya, *supra* note 41, at 320 (characterizing self-determination as universe of human rights precepts, concerned broadly with peoples). Anaya states, in part, that "self-determination requires that the governing institutional order substantially be the creation of constitutional processes guided by the will of the people, or peoples, governed." *Id.*

46. *Id.* at 75. International law is increasingly more concerned with upholding the rights of individuals as *human beings*, in contrast to its historical concern with only the rights and duties of independent sovereigns. See *id.* at 76 (recognizing that self-determination has emerged under this trend in favor of human rights, extending from core values and rights deemed to inhere in human beings).

47. See *id.* (stating that self-determination has extended from core values of human freedom and equality and promoted demise of colonial institutions of government); Simpson, *supra* note 5, at 258 ("Such emerging norms advance the principle [of self-determination] beyond its post-war origins as an instrument of decolonization toward a more nuanced and participatory ideal, one more capable of encompassing the very diverse meanings of sovereignty implied in the challenge to states from below.").

worldwide decolonization movement by giving rise to remedies that attempt to end the legacies of imperialism.<sup>48</sup>

### 1. *The Principle's Twentieth Century Development*

The principle of self-determination, led in large measure by the efforts of the United States, made its "dramatic and explosive entry into the lexicon of international politics" during World War I.<sup>49</sup> At its inception, the principle recognized the right of nations to sovereign independence.<sup>50</sup> In a 1917 congressional address, President Woodrow Wilson, the father of the modern-day principle, declared: "[N]o peace can last or ought to last which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples [from] sovereignty to sovereignty as if they were property."<sup>51</sup> President Wilson did not envision this concept as an unattainable ideal. He proclaimed that "[s]elf-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril. . . . [P]eoples and provinces are not to be bartered about

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48. See ANAYA, *supra* note 42, at 75 ("Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation."); Simpson, *supra* note 5, at 271-74 (summarizing decolonization movements throughout world behind principle of self-determination).

49. W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 21 (1977) (summarizing historical origins and early debates regarding principle of self-determination).

50. See Gordon, *supra* note 42, at 317 n.91 (noting that even before its heightened recognition during World War I, self-determination was regarded as right of nations to sovereign independence).

51. OFUATEY-KODJOE, *supra* note 49, at 79 (quoting President Wilson). In 1918, President Wilson noted that "[n]ational aspirations must be respected; peoples may now be dominated and governed *only* by their own consent." *Id.* at 75 (emphasis added) (quoting President Wilson). In that same year, Wilson stated that "the settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, [is to be made] upon the basis of the free acceptance of that settlement by the people immediately concerned." *Id.* at 80 (quoting President Wilson). In his "Fourteen Point" plan to a joint session of Congress in 1918, seven of the fourteen points embodied the right of self-determination, although the principle was not specifically mentioned by name. See OJI UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 18-19 (1972) (characterizing points VI, VII, VIII, X, XI, XII and XIII of Wilson's fourteen points as relating to self-determination). Wilson unsuccessfully attempted to incorporate the principle of self-determination within the covenant of the League of Nations by including a provision whereby "[t]he contracting parties . . . [guaranteed] to each other political independence and territorial integrity." Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 7 (1993) (quoting President Wilson).

from sovereignty to sovereignty as if they were mere chattels and pawns in a game . . . ."<sup>52</sup>

During World War II, the United States reaffirmed the principle in the Atlantic Charter when President Franklin D. Roosevelt and British Prime Minister Winston Churchill committed their countries to "'respect the right of all peoples to choose the form of government under which they wish to live'" and proclaimed that the United States and Great Britain "'wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.'"<sup>53</sup> The United States later declared that "[t]he

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52. Hannum, *supra* note 51, at 4 (quoting President Wilson). On February 11, 1918, one month after presenting his Fourteen Points plan, President Wilson reiterated his views on self-determination before a joint session of Congress in an address regarding the war aims of Germany and Austria. See ROBERT LANSING, *THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE* 95 (1921) (recounting World War I peace process from perspective of U.S. Secretary of State). During his address, President Wilson supplemented his Fourteen Points with what are known as the "four principles for permanent peace." See *id.* at 317 (listing four principles).

53. OFUATEY-KODJOE, *supra* note 49, at 98 (quoting from Atlantic Charter, first statement by President Franklin D. Roosevelt and Prime Minister Winston Churchill committing United States and Great Britain to principle of self-determination). While gaining theoretical acceptance during the first World War, the principle established during Wilson's era unfortunately was not uniformly practiced and contained an elitist and paternalistic component whereby it was applicable only to national groups who had attained "advanced nation" status. See Gordon, *supra* note 42, at 317-18 ("For non-Europeans . . . any semblance of self-determination [during and after World War I] was embodied in the League of Nations Mandate system. Within this framework, self-determination meant being entrusted to the tutelage of 'advanced nations' who were responsible for the well-being and development of their charges."). Only after achieving such status could a people be entrusted with the right to decide their own fate. See *id.* at 318-19 (describing this period as one in which people would "mature" to "bear the responsibility" of independence). In fact, the success of calls for self-determination depended on the support from one or more of the world powers. See Hannum, *supra* note 51, at 4 ("The success or failure of assertions of minority rights and self-determination in the early twentieth century depended to a great extent on support for one or more of the Great Powers, particularly during the Paris Peace Conference which re-divided post-war Europe."). As a result, "[s]elf-determination was considered only for 'nations' which were within the territory of the defeated empires; it was never thought to apply to overseas colonies.'" Stephan A. Wangsgard, *Secession, Humanitarian Intervention, and Clear Objectives: When to Commit United States Military Forces*, 3 *TULSA J. COMP. & INT'L L.* 313, 315 (1996) (quoting HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 28 (1990)). In fact, many of the territorial line-drawing after World War I was based on agreements reached among the European Allies during the war. See *id.* (illustrating that, prior to U.N.'s 1960 grant of independence to colonial countries, principle of self-determination had little power).

The current debate among many nations and students of international law relates to which groups should attain self-determination and when those groups should acquire that right. This debate, largely dictated by world powers, resembles a classic form of Anglo messianic self-image. See Chen, *supra* note 5, at 1290 (noting U.N.'s practice in colonial context can be described in terms of "who gets what,

principles of the Atlantic Charter must be guaranteed to the world as a whole—in all oceans and in all continents.’”<sup>54</sup>

The principle of self-determination thereafter attained even greater acceptance and developed further when Articles 1 and 55 of the U.N. Charter explicitly recognized its importance.<sup>55</sup> One of the U.N.’s purposes is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>56</sup> Self-determination evolved from a general principle to a basic right held by “all people,” including colonized people.<sup>57</sup> Several of the U.N.’s main instruments, including the U.N. Charter itself, recognize self-determination as a sacred right to freely determine a people’s own political and socio-economic circumstance.<sup>58</sup>

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when, and how”); *see also* Oshiro, *supra* note 17, at 83 (noting recent U.S. official position that right of self-determination is not self-executing).

54. OFUATEY-KODJOE, *supra* note 49, at 100 (quoting Under Secretary of State Welles). The United States, however, reserved the right to declare that some people were not yet “worthy of” or “ready for” self-determination. *See id.* at 100-04.

55. *See* U.N. CHARTER art. 1, para. 2 (establishing purpose of charter to be, in part, establishing friendly relations and economic cooperation between nations based on principles of equal rights and self-determination); *id.* art. 55 (same); *cf.* CRISTESCU, *supra* note 43, ¶ 216 (noting that self-determination is fundamental human right forming part of legal system established by U.N. Charter).

56. U.N. CHARTER art. 1, para. 2.

57. *See* CRISTESCU, *supra* note 43, ¶ 214 (stating International Covenants on Human Rights sets self-determination apart from other individual rights and proclaims it as universal and perpetual right); *see also* Oshiro, *supra* note 17, at 65-66 (noting that because U.S. Constitution does not recognize right of indigenous peoples to self-determination, they must turn to international law for source of right). The modern application of the principle of self-determination is now “the right of all peoples to freely determine their own political status and to pursue their own economic, social, and cultural development.” Gordon, *supra* note 42, at 320-21.

58. *See* U.N. CHARTER art. 73 (discussing colonizer’s responsibilities). The U.N. Charter states:

Members of the United Nations which have or assume responsibility for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote . . . the well-being of the inhabitants of these territories, and to this end . . .

....

[must help] to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions . . .

*Id.*; *accord* CRISTESCU, *supra* note 43, ¶ 43 (stating that Resolution 2105 recognized “the legitimacy of the struggle of peoples under colonial rule to exercise their right to self-determination and independence”); Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT’L & COMP. L. 119, 122 (1995) (“The United Nations . . . has successfully used the principle [of self-determination] to justify its unequivocal stand against colonialism, and has worked diligently to achieve the independence of peoples under colonial rule.”);

General Assembly resolutions adopted shortly after the establishment of the U.N. further developed the principle. For example, Resolution 545, adopted in 1952, recognized "the right of people and nations to self-determination as a fundamental human right."<sup>59</sup> Subsequently, Resolution 648 identified the means through which a territory could attain self-governance, namely through the attainment of independence, a separate system of self-government or the free association of a territory with another country.<sup>60</sup> Resolution 1541, adopted in 1960, reaffirmed Resolution 648's claim that self-governance could be achieved through independence, statehood or free association with an administering power.<sup>61</sup>

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The U.N. documents and resolutions that reflect this recognition are legion. See U.N. CHARTER art. 1, para. 2 (recognizing right of self-determination in all peoples); *id.* art. 55 (same); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 123, U.N. Doc. A/8082 (1970) (recognizing right of all peoples to freely determine their political status and pursue their own economic, social and cultural development); G.A. Res. 1541, *supra* note 44 (asserting all peoples have right to self-determination and declaring colonialism must come to an end); *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 6, at 71, 74, U.N. Doc. A/810 (1948) (recognizing need for peaceful international relations); see also CRISTESCU, *supra* note 43, ¶ 48 & n.40 (stating that nine resolutions adopted between 1966 and 1974 recognize "the legitimacy of the struggle of the colonial peoples and peoples under alien domination to exercise their right to self-determination and independence by all the necessary means at their disposal").

59. G.A. Res. 545, U.N. GAOR, 6th Sess., Supp. No. 20, at 36, U.N. Doc. A/2219. The recognition of the principle as a fundamental right developed to become the "driving force in the decolonization activities undertaken by the United Nations." CRISTESCU, *supra* note 43, ¶ 682.

60. See G.A. Res. 648, U.N. GAOR, 7th Sess., Supp. No. 20, at 33, U.N. Doc. A/2361 (1952) (calling for immediate transfer of power to colonial peoples); cf. Dorian A. Shaw, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT'L L.J. 1006, 1025 (1994) (noting Resolution 648 listed manifestation of freely-expressed will as essential factor in obtaining self-determination). In 1960, the General Assembly adopted Resolution 1541, which, in essence, reaffirmed Resolution 648's three means to attain self-governance. See G.A. Res. 1541, *supra* note 44, at 29 (listing emergence as sovereign independent state, free association with independent state or integration with independent state as means to attain self-governance).

61. See G.A. Res. 1541, *supra* note 44, at 29 (reaffirming means of achieving self-governance adopted in Resolution 648, but using different phraseology). Although free association is an ambiguous concept, the U.N. made clear that such an association should be "the result of a free and voluntary choice by the [dependent territory's] peoples" and must be free from colonial influence. *Id.* Resolution 1541 provides that the choice of free association should be expressed through informed and democratic processes that respect the individuality and characteristics of the ruled people. See *id.* The resolution further recognized that free associated status should probably be a temporary one, where the dependent territory's "peoples . . . retain . . . the freedom to modify the status of that territory through the expression of their will by democratic means and constitutional process . . . [and] the associated territory should have the right to determine its internal constitution without outside influence . . ." *Id.*



Resolution 1541 is considered the most comprehensive statement on the criteria for identifying a "dependent territory," a term which recognizes that a territory and its people are not self-governing.<sup>62</sup> The criteria listed in Resolution 1541 is crucial to appreciating the true nature of Puerto Rico's status because Puerto Rico meets all the hallmarks of a dependent territory. The Resolution recognizes that *prima facie* evidence of non-self-governance arises when a territory "is geographically separate and is distinct ethnically and/or culturally from the country administering it."<sup>63</sup> Resolution 1541 also notes several other factors that may be considered in identifying a dependent territory, and states that the effect of such factors on the relationship between a territory and its administering state may give rise to a presumption of non-self-governance.<sup>64</sup> After a brief review of the United States's adoption of the principle, this Article reviews the history of the United States-Puerto Rico relationship to illustrate how the political, juridical and economic factors support a finding that the United States has rendered Puerto Rico a subordinated, dependent territory.

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The history of the United States-Puerto Rico relationship is a classic example of why it is inherently difficult to achieve self-governance through free-association. The parent state can all too easily allow for a free association status and still maintain the traditional hallmarks of colonialism. For a further discussion of the means of reaching self-governance asserted in Resolution 1541, see *supra* note 44.

62. See OFUATEY-KODJOE, *supra* note 49, at 119 (listing Resolution 1541 sections providing criteria for identifying dependent territories). The purpose of Resolution 1541 in establishing criteria for dependent, or non-self-governing, territories is to place such territories under the regime of trusteeship in preparation for, and pending their eventual exercise of, their right of self-determination. See *id.* at 120-21 (noting Resolution 1541 qualifies right of peoples to self-determination by asserting right may only be exercised when people have exhibited capacity to do so, using trusteeship period if necessary). For a further discussion of the principle of trusteeship, see *supra* note 42.

63. G.A. Res. 1541, *supra* note 44, at 29.

64. See *id.* (permitting consideration of administrative, political, juridical, economic or historical factors in identifying dependent territories). Resolution 1541 further provides that if these factors affect the relationship between the territory and the administering state such that the territory is arbitrarily placed in a position of subordination, a presumption of non-self-governance arises. See *id.*

In 1970, the General Assembly reaffirmed its commitment when it adopted Resolution 2625, which declared:

By virtue of the principle of equal right and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

G.A. 2625, *supra* note 58, at 1230.

B. *The United States's Adoption of the Right to Self-Determination*

The United States not only took part in the U.N.'s development of the right to self-determination, it arguably adopted the right under both the theory of conventional treaty law and international customary law.<sup>65</sup> As some commentators have noted, "[t]reaties and rules of international customary law constitute the two primary law-creating processes of international law."<sup>66</sup> Treaty law recognizes treaties as agreements between subjects of international law creating binding obligations upon the signatories.<sup>67</sup> International customary law involves a general practice of countries and the acceptance by those countries of the practice as law.<sup>68</sup>

A strong argument can be made that the right of self-determination is part of U.S. treaty law by virtue of the fact that the U.N. Charter, as a treaty, is part of the supreme law of United States under the U.S. Constitution's Supremacy Clause.<sup>69</sup> Because the U.N. Charter was consented to by the Senate and implemented by

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65. Cf. ANAYA, *supra* note 42, at 75 (stating that "self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm"); Simpson, *supra* note 5, at 265 (noting that after World War II United States was eager to display its anticolonial credentials, but not so much as to alienate European allies in face of newly perceived Soviet threat).

66. GEORGE SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 23 (6th ed. 1976) (describing creation of international law).

67. See *id.* at 24-25 (noting international customary law does not abridge contracting parties' freedom to include whatever agreements or governing rules they wish in particular treaty, including rules that limit their freedom or override their obligations under international customary law); see also JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 29 (1993) ("A treaty is a contractual agreement by states to accept certain obligations to other states, that is, specified restrictions on their sovereignty.").

68. See SCHWARZENBERGER & BROWN, *supra* note 66, at 26 (noting that to establish international customary law one must prove that countries habitually follow certain line of conduct because they recognize *legal* obligation to this effect). The Charter of the U.N. is considered the constitution of the international community or the cornerstone of international "*jus cogens*"; as such, it is a peremptory norm that creates obligations among the members of the international community. See *id.* at 30 (describing Charter's principles as "*consensual jus cogens* . . . rules of a *de jure* order which may not be modified or abrogated by arrangements between individual Member States") (alterations in original). Generally, *jus cogens* refers to law that is binding irrespective of the will of individual parties. See GEORGE SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971) (defining *jus cogens*). In the international context, *jus cogens* refers to international law that may not be modified by individual subjects of it. See SCHWARZENBERGER & BROWN, *supra* note 66, at 29 (contrasting international customary law with international *jus cogens*); see also MALCOLM N. SHAW, INTERNATIONAL LAW 95 (2d ed. 1986) ("The concept of *jus cogens* is based upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders.").

69. See U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or

the full Congress, it is a valid U.S. treaty under the Supremacy Clause.<sup>70</sup> In turn, Articles 1 and 55 of the U.N. Charter recognize that one purpose of the U.N. is to promote friendly international relations based upon respect for the principle of self-determination.<sup>71</sup> Because these Articles are to be read in conjunction with Article 56, which requires that "all members pledge themselves to take joint and separate action" to achieve the purposes of the organization, a binding obligation upon members to ensure self-determination may be inferred.<sup>72</sup>

In addition to the constitutional recognition of conventional treaty law, the United States has adopted the right of self-determination under customary international law. In order for a principle of international law to become a binding norm of customary international law, "states" or "nations" must act in conformance with it and acknowledge its obligatory nature.<sup>73</sup> The International Court of Justice recognizes that such a recognition of a custom may be deduced from a state's attitude toward General Assembly resolutions.<sup>74</sup>

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which shall be made, under the Authority of the United States, shall be the supreme Law of the land . . .").

70. See *United States v. Steinberg*, 478 F. Supp. 29, 32 (N.D. Ill. 1979) ("The United Nations Charter, a treaty ratified by the United States, is a part of the supreme law of the land. The country has a continuing obligation to observe with entire good faith and scrupulous care all of the undertakings under this treaty . . ."). The U.N. Charter was consented to by the Senate on July 28, 1945 and ratified by the President on July 28, 1945. See *United Nations Charter*, Jun. 26, 1945, 59 Stat. 1031, 1031, 1213 (noting instruments of ratification deposited Aug. 8, 1945).

71. See U.N. CHARTER art. 1, para. 2 (stating one purpose of U.N. is to develop friendly relations among nations based on respect for principles of equal rights and self-determination of peoples); see also *id.* art. 55 (stating that U.N. would attempt to create "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples").

72. U.N. CHARTER art. 56. But see Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CAL. L. REV. 915, 947-48 (1990) (noting some commentators reject application of U.N. Charter's self-determination provision as binding law because self-determination is not defined in Charter and no working model for its application has emerged).

73. See Hinck, *supra* note 72, at 946 (discussing role of custom in international law). "[This] acknowledgment of a legal obligation is called *opinio juris*." *Id.* The U.N. Charter does not itself define the terms "state" or "nation." See U.N. CHARTER (failing to define terms). But see JAMES R. FOX, *DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW* 295 (1992) (defining "nation" as group of people sharing common identity, heritage and aspirations but not necessarily possessing territorial base and government); *id.* at 415 (defining "state" as group of people permanently occupying fixed territory, having common laws and government and capable of conducting international affairs).

74. See Hinck, *supra* note 72, at 952 (stating that International Court of Justice (ICJ) held that United States was obligated to "respect the right of peoples freely

The United States adopted self-determination under customary international law both before and after the creation of the U.N. Prior to the creation of the U.N., the United States specifically endorsed the right of self-determination in the Atlantic Charter.<sup>75</sup> After the U.N.'s creation, the United States supported several General Assembly resolutions concerning self-determination. While abstaining from the vote on Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, James J. Wadsworth, the U.S. Representative to the U.N., expressed the United States's support for the "underlying purpose" of the Resolution.<sup>76</sup> In addition, the United States was a party to General Assembly Resolution 2200, the International Covenant on Civil and Political Rights, which provides that self-determination is a "'right' of 'all peoples.'"<sup>77</sup> The United States was also a party to Resolution 2625, which called for an end to colonialism and imposed a duty on every member "'to promote, through joint and separate actions, realization of the principle of equal rights and self-determination of peoples.'"<sup>78</sup> Referring to Resolution 2625, U.N. Representative

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to choose their political status and direct their economic, social, and cultural development" and citing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 89 (June 27)).

75. See Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT'L L.J. 209, 252 (1991-92) (discussing impact of Atlantic Charter on nations' right of self-determination). The Atlantic Charter originated during a 1941 conference between President Franklin Delano Roosevelt and British Prime Minister Winston Churchill and consists of eight general points regarding their hopes for the post-war world. See *id.* at 251 (noting Atlantic Charter officially called Joint Declaration). The Atlantic Charter states, in part:

"Second, they [the United States and Great Britain] desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned. Third, they respect the right of all people to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."

*Id.* at 252 (quoting Atlantic Charter).

76. See Hinck, *supra* note 72, at 949 (quoting Wadsworth as saying that United States "denounced colonialism" and citing G.A. Res. 1514, U.N. GAOR, 15th Sess., 947th mtg. at 1238, U.N. Doc. A/PV.947 (1960)). Wadsworth served as the U.S. Representative to the U.N. for only a few months and did not actually vote on Resolution 1514. See *id.* (stating Wadsworth was U.N. representative from September 1960 to January 1961). Nonetheless, Wadsworth expressed his support for the resolution and "denounced colonialism as 'the denial of the right of self-determination.'" *Id.* (quoting G.A. Res. 1514, *supra*, at 1158).

77. See Anaya, *supra* note 41, at 321 (noting international human rights instruments affirming principle of right of self-determination) (quoting G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966)).

78. Hinck, *supra* note 72, at 951 (quoting G.A. Resolution 2625, *supra* note 58, at 123); accord Jesús G. Román, Comment, *Does International Law Govern Puerto Rico's November 1993 Plebiscite?*, 8 LA RAZA L.J. 98, 119 (1995) (noting Resolution 2625 reaffirmed principle of self-determination).

Richard Gimer noted that “‘the United States is pleased now to observe that it considers the declaration . . . to be an objective statement of relevant charter principles rather than a partisan document,’ . . . [and] the United States [is] glad that the declaration recognizes the right to self-determination.’”<sup>79</sup>

Thus, the United States was integrally involved in the evolution of the concept of self-determination from its beginning as an early-1900s idealistic principle that applied only to the struggle of peoples within a defeated empire to a twentieth-century fundamental right held by all colonized people. Moreover, the United States has recognized this fundamental right under both U.S. treaty law and customary international law.

### C. *The Attributes of a Colony*

The term “colony” is generally defined by the international community through the “salt water theory” of colonialism.<sup>80</sup> Under this theory a territory and its population are considered a colony if a body of salt water separates it from the ruling country.<sup>81</sup> The U.N. effectively accepted the salt water theory when the General Assembly adopted Resolution 1541, which defined a dependent territory as a “territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”<sup>82</sup>

Unlike independent states, colonies are possessions of the parent country, having no separate statehood or sovereignty.<sup>83</sup> “‘The

79. Román, *supra* note 78, at 120 (quoting Richard H. Grimer, *Declaration on Principles of Friendly Relations*, DEP'T ST. BULL., Sept. 1970, at 623).

80. See Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 509 (1994) (discussing status of self-determination of colonies in post-Cold War world).

81. See *id.* (describing “salt water” theory of colonialism). According to the “salt water” theory of colonialism, a colonized state will be considered non-self-governing if there is a certain geographic separateness between the colony and the colonizer. See Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 255 n.264 (1992) (arguing name “salt water” theory is misleading because it suggests any body of water will do, but generally coastal islands are not far enough away).

82. G.A. Res. 1541, *supra* note 44, at 29. Puerto Rico clearly fits within this paradigm because it is a distinct and circumscribed territory, its population is a racial mix of Spanish, African and the indigenous Tainos, the primary religion is Catholicism with distinct cultural qualities and the main language is Spanish. See Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDOZO J. INT'L & COMP. L. 131, 144 (1996) (“Puerto Rico has a racial, religious, linguistic, and territorial identity distinguishable from that of the metropole.”).

83. See ROBERT D. JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 275-76 (9th ed. 1993) (discussing differences between independent states and colonies). A key difference between states and other entities, such as colonies, is

parent state alone . . . possesses [the] international personality and has the capacity to exercise international rights and duties.'"<sup>84</sup> The parent state may, nonetheless, grant or bestow upon its colony a degree of internal autonomy and even grant autonomy over certain external affairs. These rights, however, are generally considered revocable at the discretion of the parent state.<sup>85</sup>

As for the citizenry of a colony, they are essentially part of the parent state's possession. Thus, the inhabitants of a colony more closely resemble chattel than they do human beings. They are a captive people denied the basic human right to choose their political, economic and social destinies. They are not free, and their government cannot dictate its own internal affairs, let alone behave as a sovereign. The actions of the U.S. Congress and Supreme Court during the past century with respect to Puerto Rico demonstrate that, although the Puerto Rican people have repeatedly requested to be allowed to freely determine their political future, the United States has insisted on dictating the internal and external rights and affairs of Puerto Rico.<sup>86</sup> While the United States has continued to possess Puerto Rico and its people, it has refused to fully

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that states have the capacity to enter into treaties and other international relationships subject only to the rules of customary international law. *See id.* at 275 n.1, 383-84 (identifying powers like adopting constitutions, enacting laws, organizing military forces and adopting commercial policies).

84. *Id.* at 276. A state, because of its external independence, has the right to "manage its own international affairs according to its discretion . . . it can enter into alliances and conclude other treaties, and send and receive diplomatic envoys." *Id.* at 382 (stating that only check on authority of state in this context is international customary law).

85. *See id.* at 276 & n.3 (noting that United Kingdom, in 1953, annulled Guiana's constitution and presumably accompanying rights that it had previously granted). Colonies cannot send or receive diplomatic envoys or conclude treaties because colonies have no separate statehood or sovereignty. *See id.* at 278. The parent state may, however, give the colony the right to participate to some extent in the activities of the international community; in other words, in a traditional colonial relationship, the parent state has the ability to dictate virtually every right of a sovereign that the colony may wish to claim. *See* David R. Deener, *Colonial Participation in International Legal Process*, in *INTERNATIONAL AND COMPARATIVE LAW OF THE COMMONWEALTH* 40-62 (Wilson ed., 1968) (stating that Great Britain's territories allowed to extensively participate in international legal process after Britain relaxed restraints in 1880s).

86. *See* Napoli, *supra* note 82, at 160 ("As demonstrated by the limitations of Puerto Rico's political status, the United States' domination has repeatedly denied Puerto Ricans the right to determine their own status, their own laws, and their own constitution."); *see also* Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 *HARV. BLACK LETTER J.* 93, 121 (1995) (stating that despite concessions in regard to political sovereignty, United States has never given up ultimate power over Puerto Rico).

accept these ethnically and culturally distinct people.<sup>87</sup> To this day, Puerto Rico and its people are merely possessions of the U.S. empire.<sup>88</sup> A review of the United States-Puerto Rico relationship exposes the United States's hypocritical stance regarding self-determination and illustrates an association embedded with all the classic hallmarks of colonialism.

### III. THE UNITED STATES-PUERTO RICO RELATIONSHIP AND THE COLONIZER WHO REFUSES

#### A. *The Military Government*

In 1898, following its defeat by the United States in the Spanish-American War, Spain officially ceded Puerto Rico and presumably its people to the United States.<sup>89</sup> Consistent with Congress's power under the Territorial Clause, Article 9 of the treaty granted Congress the power over "the civil rights and political status" of the territory and its people.<sup>90</sup> This treaty in effect endorsed the United

87. Cf. John L.A. de Passalacqua, *The Involuntary Loss of United States Citizenship of Puerto Ricans Upon Accession to Independence by Puerto Rico*, 19 DENV. J. INT'L L. & POL'Y 139, 150-51 (1990) (remarking Puerto Ricans part of political nation, with own characteristics, distinctive from either Spanish or Anglo-Saxon nations). There is an inconsistency between the United States legal order, which purports to make no distinction among ethnic groups, and society itself, which establishes the "pre-eminence of the Anglo-Saxon ethos." See *id.* at 151 (noting distinction between claims of U.S. legal order and society in general). Also it is clear that the United States has never fully accepted Puerto Ricans as full citizens, on par with mainland Americans. Cf. Napoli, *supra* note 82, at 142-43 (stating Puerto Rico has not yet achieved decolonization). Although Puerto Ricans are citizens of the United States, their citizenship is distinct from that of residents of one of the fifty states. See *id.* at 142 (noting United States Constitution does not fully extend to Puerto Ricans and results in inferior citizenship).

88. See Juan Cartagena et al., *United States Language Policy: Where Do We Go From Here?* 18 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 527, 529 (1993-94) (stating Puerto Rico is still possession of United States).

89. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. II, T.S. No. 343 ("Spain cedes to the United States the island of Porto [sic] Rico and other islands now under Spanish sovereignty in the West Indies."); cf. JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 1 (1979) (focusing on political developments in United States leading to Congress' granting Puerto Ricans citizenship); T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT 15, 33-40 (1994) (discussing constitutional membership and political sovereignty for Puerto Rico); Philip Joseph Deutch, Note, *The Uniformity Clause and Puerto Rican Statehood*, 43 STAN. L. REV. 685, 690-95 (1991) (providing background on Puerto Rican statehood in light of federal income tax concerns); Shaw, *supra* note 60, at 1011 (arguing establishment of commonwealth government failed to fulfill U.N.'s requirement of freely associated territory).

90. Treaty of Paris, *supra* note 89, art. IX; see also U.S. CONST. art. IV., § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."). Under the Treaty of

States's imperialistic rights because it was one of the first times in American history that "in a treaty acquiring territory for the United States, there was no promise of American citizenship," and further, "there [was] no promise, actual or implied, of statehood."<sup>91</sup>

With the United States's new position as an imperial power came its ability to decide virtually every facet of Puerto Rico's fate, from its status<sup>92</sup> to its name.<sup>93</sup> From its initial conquest almost one hundred years ago, the United States has dictated both the rights of and the form of government for the Puerto Rican people.<sup>94</sup> The United States's actions have come from both legislative enactments and Supreme Court precedents.<sup>95</sup>

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Paris, sovereignty over the Philippines, Guam and Puerto Rico passed from Spain to the United States. See Treaty of Paris, *supra* note 89, at art. II (noting Spain's relinquishment of sovereignty over ceded lands). The citizens of Puerto Rico were not, however, granted U.S. citizenship. See CABRANES, *supra* note 89, at 4 (noting Treaty of Paris did not promise Puerto Rican U.S. citizenship).

91. JULIUS W. PRATT, AMERICA'S COLONIAL EXPERIMENT 68 (1950); cf. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., T.S. No. 207 (determining end of war between U.S. and Mexico). Pratt argues that the territorial growth of the United States in the century following independence was marked by two related characteristics. See PRATT, *supra*, at 1 (identifying first characteristic as step-by-step acquisition of contiguous mainland territory and second as making each acquired territory integral part of country). Imperialism did not become a part of the American experience until 1898, after the Spanish-American War, when American sovereignty was extended to lands settled by populations that were vastly different from the American population. See *id.* at 2 (stating that after 1898 assimilation of newly acquired territory became virtually impossible).

92. See Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (codified at 8 U.S.C. § 1402 (1994)) ("[A]ll citizens of Porto [sic] Rico . . . are hereby declared, and shall be deemed and held to be, citizens of the United States . . ."). The Jones Act did allow any natives of Puerto Rico to retain their foreign status if desired. See *id.* (stating native may retain "present political status" by making declaration of decision to do so).

93. See Act of May 17, 1932, ch. 190, 47 Stat. 158 (1932) (codified at 48 U.S.C. § 731(a) (1994)) (stating that after Act takes effect, "Porto Rico" will be designated "Puerto Rico"). Although the United States was born in a war against colonialism, Puerto Rico is but one of several U.S. colonial possessions including Guam, the Commonwealth of the Northern Mariana Islands, the trust territory of Palau, the American Samoa, the Republic of the Marshall Islands and the Virgin Islands. See 137 CONG. REC. E871 (1991) (statement of Hon. Eni F. H. Faleomvacga) (stating United States flag flies over 3.7 million people and eight territories overseas) (citing Doug J. Swanson & Ed Timms, *American Empire: The U.S. Territories*, HONOLULU STAR BULL. & ADVERTISER, Sept. 23, 1990, at B1).

94. See Treaty of Paris, *supra* note 89, at art. IX-XV (addressing property rights, freedom of religion and vesting governing power in Congress). The United States's power over the Puerto Rican people officially derived from Article Nine of the Treaty of Paris, which specifically provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." *Id.* art. IX.

95. See Act of July 3, 1950, ch. 446, § 2, 64 Stat. 319, 319 (1950) (codified at 48 U.S.C. § 731(c) (1994)) (authorizing Puerto Rican people to organize constitu-



Shortly after its speedy conquest of the island,<sup>96</sup> the United States established a military government overseen by General Nelson A. Miles, the leader of the main island's invasion.<sup>97</sup> While the military government lasted only two years, it was not without its glorious promises. Following the invasion, General Miles proclaimed that the United States military forces came "*bearing the banner of freedom*."<sup>98</sup> General Miles declared that the U.S. forces did not come to make war upon the people of "*a country that for centuries has been*

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tional convention and draft Puerto Rican constitution if act adopted by island-wide referendum); §§ 12-49, 39 Stat. 955-67 (surviving conditions codified as amended at 48 U.S.C. §§ 742, 864, 868, 872 (1994)) (establishing executive, legislative and judicial departments of civil government of Puerto Rico); Foraker Act, ch. 191, §§ 18-38, 31 Stat. 77, 81-86 (1900) (surviving provisions codified as amended at 48 U.S.C. §§ 733, 736, 738-40, 744 (1994)) (establishing executive, legislative and judicial bodies for Puerto Rico)); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) ("We are therefore of the opinion that the island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the constitution."); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (concluding duties imposed after signing of Treaty of Paris not properly executed); *Dooley v. United States*, 182 U.S. 222, 235 (1901) (noting that Puerto Rico was no longer subject to U.S. tariffs after signing of Treaty of Paris); *Goete v. United States*, 182 U.S. 221, 222 (1901) (finding Puerto Rico not foreign country under tariff laws); *DeLima v. Bidwell*, 182 U.S. 1 (1901) (holding Puerto Rico not foreign country within meaning of tariff laws but rather island territory of United States).

96. See Carlos E. Díaz Olivo, *The Fiscal Relationship Between Puerto Rico and the United States: A Historical Analysis*, 8 REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO 1, 3 (1995) (noting conquest took only few weeks). In fact, the Spanish-American War is commonly referred to as "that splendid little war." 137 CONG. REC. S3900 (1991) (statement of Sen. Moynihan) (quoting Secretary of State John Hay).

97. See Olivo, *supra* note 96, at 4 (noting that General Miles ordered sustaining fiscal dispositions existing under Spanish regime). International law at the time of the Spanish-American War recognized the right of the belligerent to occupy and govern the enemy territory. See Manuel Del Valle, *Puerto Rico Before the United States Supreme Court*, 19 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 13, 21 (1984) (stating right to occupy and govern during military possession). With this in mind, in 1898, the President of the United States issued General Order No. 101, which stated that, although the United States's military power was absolute, local laws were to remain in force. See *id.* at 21-22 (noting order stated private property should not be confiscated). General Order Number 101 also gave General Miles complete authority over the island, second only to the President himself. See *id.* at 22 (noting that General Miles re-articulated General Order No. 101 to Puerto Rican people).

Senator Moynihan points out that the United States occupied the "splendid" island of Puerto Rico at a time when over a third of the world was a colony of some sovereign. See 137 CONG. REC. S3900 (describing United States at time of occupation as "colonial power"). Moynihan continued that this worldwide colonization trend first became unacceptable to Puerto Rico, then to the United States and finally to the world. See *id.* (refuting Cuban charges that United States currently enjoys colonial relationship with Puerto Rico).

98. OFFICE OF THE COMMONWEALTH OF PUERTO RICO, DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 55 (1964) (emphasis added) (proclaiming United States occupied Puerto Rico).

*oppressed*," but to promote prosperity, bestow "the immunities and blessings of the liberal institutions" of the United States government and bring the Puerto Rican people protection.<sup>99</sup> Unlike the manner in which the United States was ultimately to treat its other major conquest of the war, the Philippines, these statements at the very least suggested that the United States was prepared to accept Puerto Rico and its people as part of the United States in some form.<sup>100</sup> Unfortunately, after almost a hundred years of this relationship, the reality is that the United States is still not prepared to fully incorporate Puerto Rico and its people.

### B. *The Civilian Colonial Government*

In 1900, with the enactment of the Foraker Act,<sup>101</sup> the United States began a process which would ensure that Puerto Rico would remain a colony. The Foraker Act replaced the military government with a civilian colonial government.<sup>102</sup> It also established many other aspects of Puerto Rico's new government.<sup>103</sup>

A year after the passage of the Foraker Act, the U.S. Supreme Court began deciding the "insular cases," some of which further

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99. *Id.* (emphasis added); see also CABRANES, *supra* note 89, at 19 (arguing that Miles' proclamation suggested that Puerto Rico would have direct and lasting link to U.S. political system).

100. See CABRANES, *supra* note 89, at 19-20 (noting that Treaty of Paris confirmed Puerto Rico would become part of U.S. empire, but made no guarantees as to statehood or citizenship).

101. Ch. 191, 31 Stat. 77 (1994) (codified as amended 48 U.S.C. §§ 733, 736, 738-40, 744, 866 (1982)). The Foraker Act created a mixed system of government in which the "elected house of delegates was checked by an appointed upper house." See PRATT, *supra* note 91, at 185, 187 (noting Foraker Act also declared all inhabitants Puerto Rican citizens under United States's protection).

102. See §§ 17-29, 31 Stat. at 81-83 (designing government to include governor appointed by President of United States, executive council comprised of secretary, attorney-general, treasurer, auditor, commissioner of interior and house of delegates comprised of two houses of elected officials). The judicial branch was comprised of the local courts and tribunals previously established by the military government, but the justices of the supreme court were to be appointed by the President. See *id.* §§ 33, 31 Stat. at 84 (describing jurisdiction of court as that "defined and prescribed in and by . . . laws and ordinances"). Puerto Rico was also designated a U.S. judicial district. See *id.* § 33-34, 31 Stat. at 84-85 (describing court's jurisdiction as both ordinary jurisdiction of U.S. district court and "of all cases cognizant in the circuit courts of the United States").

103. See *id.* §§ 2-16, 31 Stat. at 77-81 (addressing such governmental decisions as location of capital, tariff duty system on trade to and from Puerto Rico, official currency and Puerto Rican government's authority to control Puerto Rican property that United States owned as result of Spanish American War). Congress was so magnanimous that it even granted "Porto Rican" citizenship to the people of Puerto Rico. See *id.* § 7, 31 Stat. at 79 (declaring as Puerto Rican citizens those individuals and their children who were Spanish subjects residing on island as of April 11, 1899).

defined the parameters of the United States-Puerto Rico colonial relationship.<sup>104</sup> In the first insular case, *DeLima v. Bidwell*,<sup>105</sup> the Court held that the Treaty of Paris established Puerto Rico as an unincorporated, but not organized, U.S. territory that should not be treated as a state.<sup>106</sup> The *DeLima* Court upheld Congress's unfettered power over Puerto Rico and its people, stating that the national legislature:

[M]ay organize a local territorial government; it may admit it [Puerto Rico] as a State . . . [and] it may sell its public lands [acquired by treaty] to individual citizens or may donate them as homesteads to actual settlers . . . when once acquired by treaty [because the territory] belongs to the United States, and is subject to the disposition of Congress.<sup>107</sup>

The next consequential insular decision, *Downes v. Bidwell*,<sup>108</sup> endorsed the United States's imperialistic prerogative, declaring that "[t]he power of Congress over the territories of the United

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104. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) ("We are therefore of the opinion that the island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the constitution."); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (concluding duties imposed after signing of Treaty of Paris not properly executed); *Dooley v. United States*, 182 U.S. 222, 235 (1901) (noting Puerto Rico no longer subject to U.S. tariffs after signing of Treaty of Paris); *Goete v. United States*, 182 U.S. 221, 222 (1901) (finding Puerto Rico not foreign country under tariff laws); *DeLima v. Bidwell*, 182 U.S. 1 (1901) (holding Puerto Rico not foreign country within meaning of tariff laws, but rather island territory of United States). The term "insular cases" is a name generally given to a series of nine decisions rendered by the Supreme Court in 1901. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REVISTA JURIDICA DE UNIVERSIDAD DE PUERTO RICO 225, 240 (1996) (noting seven of nine cases dealt with Puerto Rico, one with Hawaii and one with Philippines). There is some disagreement among commentators regarding whether the insular cases refer to cases decided by the Court after its 1901 Term. See *id.* at 240-41 (noting commentators seek to include cases decided between 1901-1914 and one as late as 1922). Generally, it can be said that all of the insular cases dealt with the status of a particular territory and the rights of its inhabitants. See *id.* at 241 (noting that various authors' arguments on subject influenced Justices' opinions in insular cases). Of the thirteen cases decided after 1901, five dealt with Puerto Rico, six with the Philippines, one with Hawaii and one with Alaska. See *id.*

105. 182 U.S. 1 (1901).

106. See *id.* at 196-97 (addressing Congress's rights over acquired territories).

107. *Id.* at 197; see also Van Dyke, *supra* note 3, at 454 (noting that Congress's power over its territories is plenary). Congress's relationship to its territories' governments is much like that of the states to their counties. See *id.* at 454 (noting that Congress has power to veto territorial government decisions and directly legislate for its territories despite their governments) (citing *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880)).

108. 182 U.S. 244 (1901).

States is general and plenary. . . . It would be absurd to hold that the United States has the power to acquire territory, and no power to govern it when acquired.'"<sup>109</sup> Justice Brown, writing for the Court, expressed a nativistic fear, still apparent today, that if the United States could not control the future of the inhabitants of newly acquired territories, or at least "their children thereafter born, whether savages or civilized," they might automatically become American citizens.<sup>110</sup> The Court went on to note that "[a] false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire."<sup>111</sup>

In light of this gingoistic concern and others, the *Downes* Court established the parameters of the doctrine of "territorial incorporation."<sup>112</sup> Under the doctrine, incorporated territories included areas that would become states and would have all parts of the U.S. Constitution applicable to them, while unincorporated territories were not intended for statehood and were subject only to funda-

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109. *Id.* at 268 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890)). In *Downes*, the constitutionality of the Foraker Act's imposition of duties on imports from Puerto Rico was challenged under the Uniformity Clause. *See id.* at 247 (noting broader question of whether Constitution's revenue clauses extend of their own force to newly acquired territories). The Uniformity Clause declares that "all duties, imports and excises shall be uniform throughout the United States." U.S. CONST. art. 1, § 8. The Court also noted that if Puerto Rico was part of the United States, the Foraker Act would be unconstitutional under Article I, Section 9. *See Downes*, 182 U.S. at 247 (stating article 1, section 9 of U.S. Constitution provides all vessels bound from states cannot be required to pay duties to another). In resolving the question, the Court held that, under the Treaty of Paris, Puerto Rico was a territory "appurtenant and belonging to the United States" and, therefore, should not be treated as a state of the United States. *See id.* at 287 (holding provision of Foraker Act imposing duties on Puerto Rican exports constitutional).

110. *See Downes*, 182 U.S. at 279 (noting U.S. power to declare terms upon which United States will receive inhabitants of acquired territories). Obviously, racism, nativism and xenophobia have weighed heavily in the ongoing debate concerning the colonization of Puerto Rico, but that is a subject not fully explored here. For a more expansive analysis of these issues, see Deborah D. Herrera, *Unincorporated and Exploited: Deferential Treatment for Trust Territory Claimants—Why Doesn't the Constitution Follow the Flag*, 2 SETON HALL CONST. L.J. 593, 609-10 (1992) (noting *Downes* decision product of Court's approval of imperialism and feeling of racial superiority). *See generally* Román, *supra* note 41 (arguing that prejudice against foreigners becoming U.S. citizens emerged early in U.S. history and ultimately shaped grant of U.S. citizenship to Puerto Ricans).

111. *Downes*, 182 U.S. at 286.

112. *See Shaw, supra* note 60, at 1014-15 (clarifying difference between incorporated and unincorporated territories). During the debate concerning whether to grant American citizenship to Puerto Ricans under the Foraker Act, there was a congressional perception that these people of mixed blood were possibly not suitable to become part of the United States. *See* RONALD FERNANDEZ, *THE DIS-ENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* 13 (1992) (stating that members of Congress had negative view of Puerto Ricans because of their African and indigenous Indian heritage and skin color).

mental parts of the U.S. Constitution.<sup>113</sup> Because the *Downes* Court concluded that Puerto Rico was an unincorporated territory belonging to the United States, it held that the U.S. Constitution did not fully apply to it.<sup>114</sup> Subsequent Supreme Court decisions similarly defined the United States's relationship with its territories as one other than that of equals.<sup>115</sup>

In 1917, during the period when President Wilson was extolling the virtues of self-determination, the U.S. Congress enacted the Jones Act,<sup>116</sup> which purportedly brought Puerto Rico a step closer to full incorporation into the United States.<sup>117</sup> The Jones Act modi-

113. See *Downes*, 182 U.S. at 339 (noting no incorporation for territory if Treaty does not sponsor incorporation until Congress supports incorporation); Shaw, *supra* note 60, at 1015 (defining unincorporated territories).

114. See *Downes*, 182 U.S. at 287 (holding that Constitution's revenue clauses do not extend to territories belonging to United States); see also Van Dyke, *supra* note 3, at 457 ("Because 'territories' were not the constitutional equivalents of 'states,' they were subject to greater Congressional control."). The *Downes* Court suggested that a distinction should be drawn between two types of rights enforced by the Constitution: natural and artificial or remedial. See *Downes*, 182 U.S. at 282-83 (explaining natural rights as those not subject to alteration of Congress, such as freedom of speech and religion, due process and right of access to courts). Artificial rights include "the right to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals." *Id.* at 283 (finding Congress must be allowed flexibility as to application of artificial rights to territories) (citation omitted). The Court held that only natural rights automatically apply to people living in territories. See *id.* at 283 (noting aliens's interest in life, liberty and property protected); see also PRATT, *supra* note 91, at 162 (discussing *Downes* and difference between fundamental (natural) and formal (artificial) provisions of Constitution).

115. See *Dorr v. United States*, 195 U.S. 138, 148 (1904) (holding that right to jury trial was not fundamental and thus did not apply to unincorporated territory); see also *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922) (finding that Congress did not intend Organic Act of 1917 as means to incorporate Puerto Rico). From the conquest of Puerto Rico until 1917, the United States expanded its sphere of influence throughout the Caribbean. The United States still refused to officially acknowledge its expansionism, so it developed a system of "protectorates" by which it gained control over a number of small republics in the Caribbean; "the term 'protectorate,' however, like the word 'colony,' had no place in the American official vocabulary." PRATT, *supra* note 91, at 115.

116. Act of March 2, 1917, ch. 145, 39 Stat. 951 (1917) (surviving provisions codified as amended at 48 U.S.C. §§ 742, 864, 868, 872 (1994)).

117. Cf. CABRANES, *supra* note 89, at 80 (stating American policymakers believed granting citizenship to Puerto Ricans would settle questions regarding island's political status). "Citizenship was the inevitable byproduct of the virtually universal view that Puerto Rico . . . was destined to remain permanently under the American flag." *Id.* at 80-81. Although President Wilson championed self-determination, his attitude toward Puerto Rico was paternalistic. See PRATT, *supra* note 91, at 139-41 (stating that President Wilson's supposedly antiimperialist foreign policy contained inconsistencies). Despite his intolerance for treating people like chattel, President Wilson purportedly believed that Puerto Rico should be treated as a ward of the United States. See RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERI-*

fied, but did not undue, the Foraker Act's colonial system of government.<sup>118</sup> The Jones Act provided the people of Puerto Rico with a form of U.S. citizenship,<sup>119</sup> granted them a bill of rights<sup>120</sup> and remodeled the three branches of government.<sup>121</sup> It left little doubt, however, as to Puerto Rico's power to govern itself: "All laws en-

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MENT 43 (1984) (noting that until Puerto Ricans could behave like American citizens, Puerto Rico was to be treated as ward of United States); *see also* CABRANES, *supra* note 89, at 72 ("[W]e shall successfully enough bind Porto [sic] Rico . . . to ourselves by ties of justice and interest and affection." (quoting 51 CONG. REC. 74, 75 (1913) (President Wilson's address))). The historical distinction between Puerto Rico and the Philippines was carried over into the Wilson administration. *See id.* at 73 (stating that Puerto Rico historically was assumed to be permanent fixture of United States, although Philippines was not).

118. *See* CABRANES, *supra* note 89, at 95 (stating Jones Act granted substantially more governmental autonomy to Puerto Rico than had been allowed under Foraker Act). Under the Jones Act, the Governor continued to be appointed by the President, but the Foraker Act's legislative branch's House of Delegates and Executive Council were replaced with a nineteen-member Senate and a thirty-nine-member House of Representatives, elected by popular vote. *See* Jones Act, ch. 145, §§ 12, 26-27, 39 Stat. 951, 955-61 (1917).

119. *See* § 5, 39 Stat. at 952 (declaring all Puerto Rican citizens, with few exceptions, citizens of United States). The residents of Puerto Rico to this day have not received first-class U.S. citizenship, as they, among other things, cannot vote for President or Vice President, and have no representation in Congress. *See* José A. Cabranes, *Puerto Rico and the Constitution*, 110 F.R.D. 475, 481 (1986) (noting Puerto Rico has been dubbed "a one-armed state"). Nonetheless, even the limited grant of citizenship for the Puerto Rican people did not arise without racist clamor. *See* 64 CONG. REC. 2250 (1917) (statement of Sen. Vardaman) ("I really had rather that [Puerto Ricans] would not become citizens of the United States. I think we have enough of that element in the body politic already to increase the nation with mongrelization.").

120. *See* § 2, 39 Stat. at 951 (declaring bill of rights for Puerto Rican people). The bill of rights provided that "no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." *Id.* The Jones Act also granted many constitutional rights for criminal defendants. *See id.* (including right to attorney and speedy trial for accused and issuance of warrants only upon probable cause).

121. *See id.* §§ 12-49, 39 Stat. at 955-67 (defining powers, limitations and qualifications of Puerto Rican executive, legislative and judicial branches). The Governor continued to be appointed by the President with the advice and consent of the Senate and was given control over all the departments and bureaus of the Puerto Rican government. *See id.* § 12, 39 Stat. at 955 (describing governor's powers and also delegating power to grant pardons and reprieves and remit fines for offenses against laws of Puerto Rico). The legislature was reorganized and modeled on the U.S. Congress. *See id.* §§ 25-27, 39 Stat. at 960-61 (creating House of Representatives and Senate with members of both elected by people). Some differences between the federal and territorial legislatures, however, continued. *See id.* §§ 25-26, 39 Stat. at 960 (providing that Senators would be elected every four years and required to read and write either English or Spanish and House members to be elected quadrennially with same literacy requirements). All local legislative power was vested in these branches. *See id.* § 25, 39 Stat. at 960 (designating legislative power). The judicial power was vested in the courts and tribunals of Puerto Rico, and the legislature was given the power to rearrange the courts and their jurisdiction as it saw fit. *See id.* § 40, 39 Stat. at 964 (providing chief justice and associate

acted by the Legislature of Porto [sic] Rico shall be reported to the Congress of the United States . . . which hereby reserves the power and authority to annul the same."<sup>122</sup> Nonetheless, some Americans believed the Puerto Rican people needed to cherish the "boon" the United States had just bestowed upon them.<sup>123</sup>

Through the enactment of the Jones Act and the holdings of the insular cases, the United States solidified its position as "the colonizer who refuses."<sup>124</sup> One commentator in his work on colonization notes that a colonizer who refuses is one who "participates in and benefits from those privileges [of colonialism] which [it] . . . half-heartedly denounces."<sup>125</sup> In fact, such a colonizer actually renounces part of itself and what it slowly becomes as it accepts life in a colony.<sup>126</sup> While this commentator's works focus on the individual who is involved in a colonization effort, the principles he extols are applicable to a country, such as the United States, which colonizes but, because of its self-image of nobility of purpose, refuses to accept its role as colonizer.<sup>127</sup> Likewise, another commentator in his works on imperialism addresses the United States's denial of its imperialistic past, noting that the American vision of "greatness" has obscured the reality of its own empire building.<sup>128</sup> Through this self-denial, the United States has been able to expand its sphere of political, economic and military influence through direct and in-

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justices of Puerto Rican Supreme Court to be appointed by President with advice and consent of Senate).

122. *Id.* § 34, 39 Stat. at 962. By virtue of the Organic Acts, the United States had thus established a governmental structure in which the people of the territory were subjected to absolute central control by the parent country. See TORRUELLA, *supra* note 9, at 118 (noting power over territory with no pledge of future equality). "[A]ll governors, judges and principal government officials were appointed by Washington; local legislation could be annulled by Congressional veto; there was no effective representation in Washington; [and] Congress could exercise plenary power over even local affairs." *Id.*

123. See FERNANDEZ, *supra* note 112, at 92 ("[W]hen Porto [sic] Ricans passed from under the government of Spain, they lost the protection of that government . . . and they had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign." (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 308 (1922))). "[R]esponding to the yearning of the islanders, the United States gave them the 'boon' of [U.S.] citizenship." *Id.*

124. MEMMI, *supra* note 11, at 19.

125. *Id.* at 20.

126. See *id.* (discussing dilemma of colonizer who refuses but is seduced by advantages of colonial life).

127. The United States can be classified as a "colonizer who refuses" because it has repeatedly failed to acknowledge its colonial possessions. For a further discussion of the United States's failure to recognize the territories, see *infra* notes 134-41 and accompanying text.

128. See SAID, *supra* note 15, at 8-9 (discussing contrast between American "idealism" and "imperialism").

direct annexation of other lands, while at the same time denouncing imperialism elsewhere and remaining comfortable with its conscience.<sup>129</sup>

Almost from the inception of the colonial relationship, the United States has been able to "refuse" in order to avoid labeling itself a colonizer. The insular cases and the Jones Act aptly illustrate the distinguishing characteristic of American colonialism: the United States possesses colonies, but refuses to acknowledge its colonial ways. For example, in the early 1900s the U.S. Supreme Court called Puerto Rico an "unincorporated territory," a term that did not fit in the vocabulary of classic colonialism.<sup>130</sup> This refusal has lasted nearly a century; from the ingenious use of the "unincorporated territory" to the more recent descriptor of "commonwealth," the United States has found a way to deceptively change traditional colonial doctrinal parlance.

By perpetually denying its imperialistic actions, the United States could acquire a territory and its people and, without much guilt, treat them differently from the citizenry of the states in the union. Although the Jones Act's grant of U.S. citizenship suggested that the Puerto Rican people would soon see full incorporation into the American political community, subsequent U.S. action, made it clear that all they were actually given was a form of second-class citizenship.<sup>131</sup> This token grant of acceptance had the effect of perpetuating the colonial relationship.<sup>132</sup> Unlike the promise of independence made to the people of the Philippines a year earlier, the Jones Act failed to free Puerto Rico from, or fully incorporate it as a part of, the United States. Thus, the United States's refusal to release or incorporate Puerto Rico resulted in a compromise of citizenship that "cemented a relationship under which the Puerto Ricans have endured the mixed blessings of colonial rule by a na-

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129. Cf. *Plebiscite Joint Hearing*, *supra* note 17, at 19 (statements of Rep. Gutierrez) ("Our country, born of a revolutionary war of independence, does not take too well to the role of colonial ruler.").

130. See CARR, *supra* note 117, at 44 (stating that American colonialism is distinguishable from other types of colonialism because U.S. government refused to acknowledge it possessed colonies).

131. For a further discussion of the nature of Puerto Ricans' American citizenship, see *supra* note 119 and accompanying text.

132. See CABRANES, *supra* note 89, at 7 ("The creation of a second-class citizenship for a community of persons that was given no expectation of equality under the American system had the effect of perpetuating the colonial status of Puerto Rico.").



tion convinced of its decent intentions and embarrassed by the very notion of colonialism."<sup>133</sup>

### C. *The Reason to Colonize*

At first glance, in light of its distaste for the colonizer label, it might seem peculiar for the United States to be so concerned with acquiring and maintaining the territory of Puerto Rico. The United States, however, had significant reasons for its empire building. One of the more compelling reasons for this almost obsessive interest in Puerto Rico is that the territory was of significant strategic military and economic importance to the United States.<sup>134</sup> Because of its location in the Caribbean and its proximity to the Panama Canal, Puerto Rico was too important to give up.<sup>135</sup> Almost

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133. Cabranes, *supra* note 119, at 479. Puerto Rico has benefitted enormously from its relationship with the United States in the areas of education, public health, sanitation and public works. *See id.* (noting, however, island has paid price in form of political subordination and deep sense of dependency and powerlessness). Also, Puerto Rico's economy has grown steadily because of the large amount of trade it receives from the United States but, "because the island's economy is wholly dependent on trade with the mainland, its cost of living is comparable to that of New York City." *Id.* at 481. Finally, the people of Puerto Rico are given the blessing of U.S. citizenship, but that blessing is tempered by their inability to vote for President or elect voting representatives to Congress. *See id.* (noting term "colonialism" describes United States-Puerto Rico relationship).

134. *See* FERNANDEZ, *supra* note 112, at 57-58, 68, 137-38, 144, 173-75 (stating from moment it was acquired, and especially during World War II, Puerto Rico was considered important to United States's own defense). The United States's position on the possible benefits of its relationship with Puerto Rico was very clear: "We want Porto [sic] Rico to help make the Gulf of Mexico an American lake. We want it for purposes of self-defense." 43 CONG. REC. H2926 (1909) (statements of Rep. Cooper). Sentiments like Representative Cooper's grew stronger as World War II approached. As the war grew closer, the need for air bases in the Caribbean became an "obvious necessity." *See Report on Need of Additional Naval Bases to Defend the Coasts of the United States, Its Territories, and Possessions*, H.R. DOC. No. 76-65, at 15 (1938) (determining Puerto Rico desired by Navy for strategic reasons). Once this determination was made, Puerto Rico, as one of the few U.S. territories in the area, became the obvious choice. *See* FERNANDEZ, *supra* note 112, at 138 (noting that Puerto Rico was obvious because of "dearth" of choices in area). Even after World War II, Puerto Rico remained strategically important for military training and mock bombings by the United States. *See id.* ("Geography and technology had involuntarily placed the island on the world stage, and . . . [it] would stay on that stage, a key to U.S. defense . . .").

135. *See* DIETZ, *supra* note 3, at 185 ("Puerto Rico was believed important, perhaps essential, to the defenses of the United States in the Caribbean and of the Panama Canal."); *see also* CARR, *supra* note 117, at 308 ("[T]he United States has a direct interest in retaining Puerto Rico. This interest derives from its larger interest in the Caribbean and Latin America [as witnessed by the Monroe Doctrine]."). The Monroe Doctrine stated that any threat from abroad to the security of the Western Hemisphere was a threat to the entire hemisphere, including the United States. *See* Fox, *supra* note 73, at 289 (noting that President James Monroe announced doctrine in 1823 message to Congress).

immediately after the conquest, Congress wanted Puerto Rico to become essentially a naval base.<sup>136</sup> Representative Cooper of Wisconsin reasoned "[w]e want Porto [sic] Rico to help us make the Gulf of Mexico an American lake."<sup>137</sup> An 1898 study similarly noted the importance of the Caribbean in relation to the defense of the Panama Canal.<sup>138</sup> "[M]ilitary considerations can be considered the main determinant in the decision to acquire specific territories and, eventually, in the establishment of direct colonial control, as opposed to informal, or indirect, economic or political hegemony."<sup>139</sup>

During World War II, President Roosevelt cautioned that releasing this possession "would be repugnant to the most elementary principles of national defense."<sup>140</sup> Puerto Rico became even more strategically significant during the second half of this century with the emerging power of the Soviet Union and Fidel Castro's revolution in Cuba. In addition to its military significance, Puerto Rico was used for foreign policy public relations efforts. The United States was pleased to display Puerto Rico as an example of the benefits of being aligned with the United States. Puerto Rico became, and is still known as, the United States's "Shining Star of the Caribbean."<sup>141</sup> Thus, Puerto Rico was integral to U.S. foreign policy interests and the United States made sure that its interests were not undermined.

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136. See FERNANDEZ, *supra* note 112, at 57-58 (stating that United States wanted Puerto Rico as possible point of access to Caribbean's Windward Passage). In case something happened to the U.S. base on Cuba, the back-up plan was to use Puerto Rico. See *id.* (stating that, because of potential importance of island, "the United States had to retain Puerto Rico.").

137. 43 CONG. REC. H2926 (1909) (statement of Rep. Cooper).

138. See FERNANDEZ, *supra* note 112, at 58 (noting importance of islands in defending Panama Canal). Prior to its involvement in World War II, the U.S. used Puerto Rico to conduct mock air and naval attacks. See *id.* at 138 (describing mock battle over San Juan).

139. Ramos, *supra* note 104, at 316. The United States acquired direct control over Puerto Rico to "provide uninhibited access to its territory, its resources and even its people for military purposes." *Id.*

140. President's Message to Congress Regarding the Government of Puerto Rico, 1943 U.S.C.C.S. 3-88 (Sept. 28, 1943). The U.S. Navy subsequently used Puerto Rico's smaller islands, Vieques, and Culebra, as Naval bases and target ranges for large scale bombing efforts. See FERNANDEZ, *supra* note 112, at 237-38 (discussing military tests undertaken despite Puerto Rico's protests).

141. Cf. CARR, *supra* note 117, at 203 (describing how American programs stimulated Puerto Rican economy).

### D. *The Creation of the Commonwealth*

In 1943, forty-five years after the initial occupation, the first major legal efforts were made to address the Puerto Rican people's lack of autonomy.<sup>142</sup> Here again, the United States, uncomfortable with the role of colonizer, continued its denial and eventually developed a new euphemism for the term "colony": "commonwealth" status.<sup>143</sup>

During the same period that the United States was endorsing self-determination principles in the Atlantic Charter, the Puerto Rican people cried out for an end to colonialism.<sup>144</sup> After fifty years of U.S. control, the Puerto Rican legislature, relying upon the United States's declarations in the Atlantic Charter, demanded that Congress terminate "the colonial system of government . . . totally and definitely."<sup>145</sup> Shortly after that demand, President Roosevelt initiated the first of what was to become the trademark U.S. response to the Puerto Rican plea for autonomy—congressional or executive department hearings to review the status issue. President Roosevelt's committee proposed amendments to the Jones Act and forwarded a proposed bill to Senator Tydings for introduction before Congress.<sup>146</sup> Tydings had sympathetically observed:

[I]f you are willing to have help of a kind and have no real voice in the government of the nation to which you are appended, why, then, that is one thing.

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142. See TORRUELLA, *supra* note 9, at 138-39 (discussing rising anticolonial sentiment of Puerto Rican people in early 1940s). By early 1943, Puerto Rico's political leadership began to call for an end to Puerto Rico's colonial status in accordance with the anticolonial sentiment of the Atlantic Charter, which was followed by a concurrent resolution of the Legislature calling on Congress to bring an end to the colonial system of government. See *id.* at 138 (noting that one year passed before Puerto Rican Resident Commissioner introduced House Bill 7352 in effort to win approval for elected, instead of appointed, governor). For a further discussion of the Atlantic Charter, see *supra* note 53-58 and accompanying text.

143. Cf. Van Dyke, *supra* note 3, at 473 (noting that Congress bestowed commonwealth status upon Puerto Rico in 1952).

144. See TORRUELLA, *supra* note 9, at 138 (stating United States ignored Puerto Rico's vehement attempts to gain political autonomy and self-government).

145. *Autonomy Is Asked For in Puerto Rico Vote*, N.Y. TIMES, Feb. 11, 1943, at 6.

146. See TORRUELLA, *supra* note 9, at 139 (stating Roosevelt's response to rising pressure from Puerto Rico to change its political status was to appoint committee consisting of Puerto Ricans and Americans to review Jones Act).

If I were a Puerto Rican that would not satisfy me, just as it did not satisfy George Washington, Thomas Jefferson, and Simeon Bolivar.<sup>147</sup>

Roosevelt's initiative resulted in the enactment of laws that would produce the next changes in Puerto Rico's governmental structure, but which ultimately amounted to only a modicum of autonomy for the Puerto Rican people. In 1947, a year after the Philippines was given independence, Congress passed legislation that granted the Puerto Rican people the right to select a governor of their own choosing and empowered the governor to appoint executive officials.<sup>148</sup>

In 1950, Congress enacted Public Law 600, which, in the form of a "compact" between the United States and Puerto Rico, granted the people of Puerto Rico further powers, including the right to organize a government and adopt a constitution.<sup>149</sup> As will be addressed below, the use of the term "compact" assisted the United States in appeasing Puerto Rican and international calls to end the colonial status of Puerto Rico.<sup>150</sup> Unfortunately, the use of "compact," and the representations by U.S. officials concerning the new status, left both the international community and the Puerto Rican political spectrum in a state of turmoil concerning the true status of the territory, an occurrence that has fostered the maintenance of the status quo.<sup>151</sup>

Sections 1 and 2 of Public Law 600 provided that a referendum would be submitted to the Puerto Rican people to determine if they wished to organize their own government pursuant to a constitu-

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147. *Hearings Before the Committees on Territories and Insular Affairs*, 78th Cong. 137 (1943).

148. See OFFICE OF THE COMMONWEALTH OF PUERTO RICO, *supra* note 98, at 113-16 (describing Elective Governor Act).

149. See Olivo, *supra* note 96, at 64 ("The preamble of the Act stated: 'Fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.'" (quoting Jones Act, ch. 145, 39 Stat. 951, pmbl. (1917))); see also TORRUELLA, *supra* note 9, at 146-47 (giving overview of various provisions of Public Law 600).

150. For a discussion of the use of the term "compact" to assist in opposing calls to end Puerto Rico's colonial status, see *infra* notes 164-66 and accompanying text.

151. See TORRUELLA, *supra* note 9, at 147-59 (discussing confusion created by use of term "compact"). The term "compact" has created confusion because it implies a mutuality which does not, in fact, exist. See *id.* at 159 (stating "compact" is not contract). In reality, because Public Law 600 may be repealed by Congress, the entire so-called "compact" may be unilaterally rescinded. See *id.* at 147-59 (discussing fact that Public Law 600, and all accompanying benefits to Puerto Rico, may be taken away at Congress's will).

tion of their own choosing.<sup>152</sup> Although these provisions suggest that Puerto Rico was to be granted autonomy, the rest of the act made clear that Puerto Rico was not free from U.S. control.<sup>153</sup> Specifically, Public Law 600 provided that if the Puerto Rican people adopted a constitution, the President would transmit it to Congress "if [the President found] that such constitution conform[ed] with the applicable provisions of this Act and of the Constitution of the United States."<sup>154</sup> Further, House Report 2275 on Public Law 600 confirms Congress's intent to keep Puerto Rico a U.S. possession:

This bill does not commit the Congress, either expressly or by implication, to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status.

...

The United States has never made any promises to the people of Puerto Rico, or to Spain from whom Puerto Rico was acquired, that Puerto Rico would eventually be admitted into the Union.<sup>155</sup>

Consistent with its intended imperialistic tenor, Public Law 600's proposed referendum failed to provide the Puerto Rican people with options other than colonial or commonwealth status, as the choice of "permanent" association with a "federal union" was posed in a yes-or-no referendum.<sup>156</sup> The referendum was thus not a statement of the Puerto Rican peoples' freely expressed will. In any event, in 1951 a referendum was held in Puerto Rico to approve Public Law 600.<sup>157</sup> A second referendum was held to approve the

152. See Act of July 3, 1950, Pub. L. No. 600, §§ 1-2, 64 Stat. 319 (1950) (codified at 42 U.S.C. § 73(b)-(c) (1994)) ("Upon the approval of this Act, by a majority of the voters participating in such a referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico.").

153. See TORRUELLA, *supra* note 9, at 146 (stating bill would not alter Puerto Rico's status as unincorporated territory).

154. § 3, 64 Stat. at 319.

155. H.R. REP. NO. 81-2275, at 3 (1950).

156. See Napoli, *supra* note 82, at 139 (stating referendum failed to offer option of independence); see also Manuel Rodríguez Orellana, *Legal and Historical Aspects of the Puerto Rican Independence Movement in the Twentieth Century*, 60 REVISTA JURIDICA DE UNIVERSIDAD DE PUERTO RICO 567, 573 (1991) ("[T]he self-contradictory myth of 'maximum-degree-of-autonomy' compatible with the 'permanent association' within a 'federal union' was sold to the voters of Puerto Rico in a yes-or-no referendum.").

157. See Arron Guevara, *Puerto Rico: Manifestations of Colonialism*, 26 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 275, 282 (1992)

constitution.<sup>158</sup> In March of 1952, by virtue of Public Law 447, Congress, after amending portions, approved the Puerto Rican Constitution and revoked inconsistent provisions of the Jones Act.<sup>159</sup>

In the summer of 1952, the Puerto Rican Constitution and the Commonwealth of Puerto Rico were born. The first popularly elected Puerto Rican governor, Luis Muñoz Marin, attempted to give some real teeth to Puerto Rico's new status.<sup>160</sup> Tracking the introductory remarks of the law, Muñoz Marin argued that Public Law 600 transformed the relationship between the Puerto Rican people and Congress to one which could not be altered without the consent of each of the contracting parties.<sup>161</sup> By virtue of this so-called compact, the Puerto Rican people acquired a certain amount of local autonomy.<sup>162</sup> The autonomy bestowed upon Puerto Rico by its parent state, however, was unquestionably limited and revocable, as is the case in a classic colonial relationship. In fact, all of the parties involved, including Muñoz Marin, accepted that the United

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(stating that Public Law 600 was approved by Puerto Rican people in referendum held on June 4, 1951).

158. See Shaw, *supra* note 60, at 1030 (stating that after Public Law 600 was approved, elected delegates approved constitution and submitted it to referendum, which voted to approve it).

159. See Joint Resolution of July 3, 1952, Pub. L. No. 447, 66 Stat. 327 (referred to at 48 U.S.C. § 73d (1994)) (approving Puerto Rican constitution). Before approving the Constitution, Congress decided to revoke certain rights granted by the Puerto Rican Constitution, including the right to free public education and the official recognition of certain human rights. See TORRUELLA, *supra* note 9, at 154-58 (describing amendment process). Congress insisted on amending Article II, Section 5 of the Puerto Rican Constitution to exempt private school students from compulsory attendance at public schools. See *id.* (same). Additionally, Section 3 of Article VII was amended to read:

Any amendment or revision of this constitution shall be consistent with the resolution by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600 . . . adopted in the nature of a compact.

66 Stat. at 327; cf. TORRUELLA, *supra* note 9, at 154, n.158 (discussing congressional debate over eventual changes in Puerto Rican Constitution).

160. See CARR, *supra* note 117, at 82 (discussing Luiz Muñoz Marin's efforts to expand Puerto Rico's control over own destiny). "Muñoz Marin would devote the rest of his political career to rid the notion of 'compact' of all ambiguities." *Id.* Muñoz Marin pushed the Truman administration to take Puerto Rico's case to the U.N. in an effort to remove Puerto Rico from the list of colonial states. See FERNANDEZ, *supra* note 112, at 183 (stating Muñoz Marin wanted to demonstrate that island's new status had world's endorsement).

161. See CARR, *supra* note 117, at 77 (noting United States deliberately avoided using term "contract").

162. See Olivo, *supra* note 96, at 65 (noting new rights included right to elect own governor and legislature, appoint judges and all officials in executive branch and set own economic policies subject to United States laws and governmental largess).

States maintained complete control over Puerto Rico and could even revoke the Puerto Rican Constitution.<sup>163</sup>

Public Law 600's use of the term "compact" also allowed the United States to address a potential international embarrassment that it might soon face concerning Puerto Rico.<sup>164</sup> As a signatory

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163. See generally *Hearings Before the House Comm. on Public Lands on H.R. 7674 and S. 3336*, 81st Cong. (1950) (statement of Muñoz Marín) ("[I]f the people of Puerto Rico would go crazy, Congress can always get around and legislate again. But I am confident that the Puerto Ricans will not do that, and invite congressional legislation that would take back something that was given [to them] . . . as good United States citizens.").

A Senate report concerning the new status recognized that under Public Law 600, Puerto Rico remained a possession, noting that "[t]he measure would not change Puerto Rico's fundamental political, social and economic relationship to the United States." *Hearings Before a Senate Committee of the Committee on Interior and Insular Affairs on S. 3336*, 81st Cong. 37 (1950). Puerto Rico's status was also acknowledged in a memorandum concerning Public Law 600, written to Senator Butler, a co-sponsor of the bill, notes:

"The Congress . . . can still make any Federal law applicable or inapplicable to Puerto Rico as it sees fit, or pass laws affecting Puerto Rico alone when it is desirable. It can also nullify the Puerto Rican Constitution if it wishes, since, technically, Puerto Rico is still a territory subject to the rules and regulations of Congress under the Constitution."

SURENDRA BHANA, *THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION 1936-1968* 123 (1975) (quoting Memorandum to Sen. Butler (Mar. 13, 1995, Butler Papers/NSHS, folder on S.3336, Box 182)).

During hearings before the Senate Committee on Interior and Insular Affairs concerning Public Law 600, Senator Malone of Nevada questioned whether the Puerto Rican Constitution could prohibit Congress from making unilateral changes to the relationship between Puerto Rico and the United States. See *id.* ("Senator George W. Malone of Nevada, who apparently was unfamiliar with the Puerto Rican Constitution, asked whether there was a provision that prohibited Congress from making unilateral changes in the relationship between Puerto Rico and the United States once the constitution was approved."). Describing the proposed Constitution, as "a compact . . . in the nature of contractual obligations," the U.S. congressional legal counsel, in reply to Senator Malone, noted that "[i]t is our hope and it is the hope of the Government, I think, not to interfere with that relationship but nevertheless the basic power inherent in the Congress of the United States, which no one can take away, is in the Congress." *Hearings Before the Senate Comm. on Interior and Insular Affairs S.J. 151*, 82d Cong. 43-4 (1952) (statement of Irwin Silverman, Chief Counsel, Office of Territories, Dep't of Interior).

The committee chairman, Senator O'Mahoney, added: "I think it may be stated as fundamental that the Constitution of the United States gives the Congress complete control and nothing in the Puerto Rican constitution could affect or amend or alter that right." *Id.* at 140 (statement of Sen. Joseph C. O'Mahoney). As to whether the United States should lose its control over Puerto Rico, Congressman Crawford confidently declared:

No one need have any apprehension about a grant of undue powers under this Act to the people of Puerto Rico. Congress retains all essential powers set forth under our Constitutional system, and it will be Congress and Congress alone which ultimately will determine the changes, if any, in the political status of the island.

109 CONG. REC. H9595 (1950) (statement of Rep. Bartlett).

164. See DIETZ, *supra* note 3, at 233 (stating that after 1948 elections in Puerto Rico "the next political problem to be faced was resolution of the status issue to

to the U.N. Charter, which specifically endorsed self-determination, the United States faced the potential of increasing international scrutiny.<sup>165</sup> Specifically, the United States faced the dilemma of being a member of an international organization that promoted self-determination and could therefore criticize the United States concerning Puerto Rico. The United States responded by ingeniously using the compact language of Public Law 600 and the territory's new status to avoid international condemnation. As this Article will demonstrate, Puerto Rico's political status remained unchanged as a result of the creation of the commonwealth status despite the United States's statements to the international community concerning Puerto Rico.<sup>166</sup> Next, this Article will illustrate how the United States "sold" Puerto Rico's new status to the international community.

E. *Continuing to Refuse and the Half-Truths to the International Community*

The change in Puerto Rico's status to that of a commonwealth gave the United States an opportunity to both quell some of the Puerto Rican people's pleas for self-government and to be relieved from international scrutiny concerning accusations of colonialism.<sup>167</sup> After the United States became a party to the U.N. Charter, Puerto Rico was classified as a non-self-governing territory under Chapter XI of the Charter.<sup>168</sup> Pursuant to Chapter XI, the U.N. required participating nations to submit information on the economic, social and educational conditions of territories that had not

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relieve the United States of its stigma as a colonial power and, in particular, to end the need to make regular reports to the United Nations on Puerto Rico.").

165. See CARR, *supra* note 117, at 339 (stating U.N.'s creation made Puerto Rico's issue with international dimensions); FERNANDEZ, *supra* note 112, at 149 (stating that Senator Tydings, in 1943, referred to Puerto Rico as "a blot on the American system.'").

166. For a discussion of the lack of change in Puerto Rico's political status, see *infra* notes 280-418 and accompanying text.

167. See Guevara, *supra* note 157, at 283-84 (stating that because of new "commonwealth" status, U.N. no longer considered Puerto Rico to be colony); see also Román, *supra* note 78, at 125 ("[W]ith the proclamation of the Commonwealth of Puerto Rico . . . the United States requested that Puerto Rico be dropped from the list of non-self-governing territories."); cf. FERNANDEZ, *supra* note 112, at 213-16 (discussing different groups' viewpoints on self-determination issue).

168. See H.R. REP. NO. 104-713, pt. 1, at 12-14 (1996) (discussing report of United States-Puerto Rico Political Status Act and impact of Chapter XI of U.N. Charter on Puerto Rico).



yet attained self-government status.<sup>169</sup> Acting as Puerto Rico's administering power, prior to the enactment of Public Laws 447 and 600, the United States was required to submit such information to the U.N.<sup>170</sup> In 1953, after the enactment of Public Laws 447 and 600, the United States formally notified the Secretary-General of the U.N. that the United States would cease reporting information concerning Puerto Rico pursuant to Article 73(e) of the U.N. Charter.<sup>171</sup> According to the United States, "[w]ith the establishment of the Commonwealth of Puerto Rico, the People of Puerto Rico have attained a full measure of self-government."<sup>172</sup> In addition to this new "full measure" of self government, the formal notification document informed the U.N. that the cessation of information on Puerto Rico was based on the "new constitutional arrangements" in the territory.<sup>173</sup> Thus, the creation of the commonwealth status resulted in Puerto Rico becoming essentially autonomous.<sup>174</sup>

The U.N. in turn, accepted the United States's decision to cease sending information on Puerto Rico,<sup>175</sup> recognizing that:

In the framework of [Puerto Rico's] Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.<sup>176</sup>

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169. See *id.* at 12 (stating that adherence to Chapter XI of U.N. Charter required United States, under Article 73(e), to transmit reports to U.N. regarding conditions in Puerto Rico).

170. See *Puerto Rican Sovereignty and the International Community: Puerto Rico's Status Under Continuing Consideration by U.N. Committee, Despite U.S. Opposition*, reprinted in 3 PUERTO RICO: POLITICAL STATUS REFERENDUM 187 (1992) [hereinafter *Puerto Rican Sovereignty*] (stating that annual information on Puerto Rico was reported to U.N.).

171. See H.R. REP. NO. 104-713, pt. 1, at 12 ("In 1953 the U.S. informed the U.N. that it would cease to transmit information regarding Puerto Rico pursuant to Article 73(e) of the Charter based on establishment of local constitutional government in Puerto Rico under Public Law 600.").

172. *Id.* at 57 app. IV.

173. See *id.* at 12 (noting cessation of transmission of information was based on establishment of local institutional government).

174. See *id.* at 13 (stating U.N. believed Puerto Rico status to be that of "autonomous political entity" (quoting G.A. Res. 747, U.N. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc. A/2630 (1953))).

175. See Guevara, *supra* note 157, at 283 (noting U.N. passed resolution affirming U.S. decision to send information concerning Puerto Rico to U.N.).

176. G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25-26, U.N. Doc. A/2630 (1953).

Notwithstanding the U.N. proclamation, the United States was harshly criticized within the international community. For example, Liberian Ambassador Lawrence stated: "I do not believe that any representative will maintain that Puerto Rico is independent or that it has achieved a full measure of self-government . . . ."<sup>177</sup>

In 1972, the U.N.'s Decolonization Committee adopted a resolution recognizing "the inalienable right of the people of Puerto Rico to self-determination."<sup>178</sup> The Committee urged the United States to take all necessary measures to transfer total sovereignty to Puerto Rico. Initially, two out of the three major political parties in Puerto Rico rejected the committee's action.<sup>179</sup> The party supporting the commonwealth status, the Popular Democratic Party ("PDP"), had historically envisioned developing a relationship as one between equals.<sup>180</sup> Because it thought it could eventually persuade the United States to grant Puerto Rico enhanced rights, the PDP argued against U.N. involvement, declaring that Puerto Rico had chosen its status in 1952.<sup>181</sup> Similarly, the New Progressive Party ("NPP"), in support of statehood, argued that the U.N. "had

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177. U.N. GAOR, 4th Comm., 8th Sess., 459th plen. mtg. at 309, U.N. Doc. A/PV 459 (1953).

178. 27 U.N. GAOR Committee on Colonial Countries 27th Sess., 890th mtg., U.N. Doc. A/AC.109/419 (1972). In 1965, Cuba requested, at the behest of independence advocates in Puerto Rico, that the case of Puerto Rico be added to the agenda of the U.N.'s Decolonization Committee. See JOSÉ TRIAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 137 (1997). From 1973 to 1977, the committee approved yearly resolutions reaffirming "the inalienable right of the people of Puerto Rico to self-determination and independence. TRIAS MONGE, *supra*, at 138.

179. See Román, *supra* note 78, at 126 (stating parties condemned committee's interference as "flagrant interference"). The status question is so important to Puerto Rican politics that the country's three main political parties define and distinguish themselves based on their respective positions on the status issue. See 137 CONG. REC. S3901 (1991) (statement of Sen. Moynihan) (noting that there is "commonwealth" party, "statehood" party and "independence" party). The Popular Democratic Party ("PDP") supports an enhanced commonwealth status, the New Progressive Party ("NPP") supports statehood, and the Puerto Rican Independence Party ("PIP") supports independence. See Román, *supra* note 78, at 112 n.105 (noting views of each party on status question).

180. See H.R. REP. NO. 105-131, pt. 1, at 23 (1997) (describing PDP's proposed "commonwealth" definition as predicated upon "longstanding" doctrine that "Puerto Rico's status has been converted into a permanent form of associated autonomous statehood.").

181. See Román, *supra* note 78, at 126 (stating PDP "'rejected any outside intervention designed to impose on Puerto Rico terms which violate the free self-determination already expressed by the Puerto Rican people with regard to their destiny and political status'" (quoting Letter of Governor Rafael Hernandez-Colón to the rapporteur of the Committee of Twenty-Four, July 11, 1997)); see also 137 CONG. REC. S.3901 (1991) (statement of Sen. Moynihan) (noting Muñoz Marin worked with President Kennedy to achieve commonwealth status).

no right to interfere with the domestic concerns of United States citizens.”<sup>182</sup> Evidently as a result of continuing United States inaction, all three Puerto Rican political parties subsequently appeared before the committee and denounced the commonwealth status.<sup>183</sup> Even the PDP, which supported commonwealth status, stated that “it is precisely the absence of development and growth [of the Commonwealth]. . . that casts doubt on the validity of that status as a formula for the decolonization of Puerto Rico.”<sup>184</sup> The independence supporters, representing both the Puerto Rican Independence and Socialist parties, actively participated in the committee’s hearings, contending that Puerto Rico was a colony and the U.N. should force the United States to give the territory its independence.<sup>185</sup> In 1978, the committee, after hearing testimony from leaders of Puerto Rico’s independence, statehood, and commonwealth parties, noted: “Virtually the whole spectrum of political opinion in Puerto Rico has appeared here this past week and criticized the island’s commonwealth status. All speakers, despite their otherwise conflicting views, agreed that there were at least vestiges of colonialism in Puerto Rico’s current relationship with the United States.”<sup>186</sup>

More recently, in 1991, the Decolonization Committee stated that it “deplores the fact that the U.S. Congress has not yet adopted the legal framework for the holding of a referendum.”<sup>187</sup> The committee requested the United States to develop a framework to en-

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182. Román, *supra* note 78, at 127.

183. *See id.* (summarizing political parties’ criticisms regarding Puerto Rico’s status development).

184. *Id.* at 127 (alteration in original). The pro-Commonwealth party turned to the U.N. in an attempt to obtain greater rights. Governor Rafael Hernández-Colón, a commonwealth supporter, testified that because the United States had not recognized the Puerto Rican people’s will, the U.N. should become involved. *See Puerto Rican Sovereignty, supra* note 170, at 189 (stating Hernández-Colón recommended that U.N. require U.S. to recognize Puerto Rican people’s desire to modify terms of association, so that free associated state would achieve full self-government).

185. *See Puerto Rican Sovereignty, supra* note 170, at 18-89 (expressing sentiments regarding Puerto Rico’s political sovereignty).

186. Guevara, *supra* note 157, at 300. In 1981 and 1982, the Decolonization Committee asked the General Assembly to include the Puerto Rican case directly in its agenda. *See TRIAS MONGE, supra* note 178, at 139.

187. *U.N. Urges Puerto Rican Referendum*, CHI. TRIB., Aug. 16, 1991, at 16; *see* Román, *supra* note 78, at 129-130. (“The vote [passing the Resolution] was 10-1 with 10 abstentions. The vote has particular importance because it is the first time that all Latin American and Caribbean countries in the Committee voted in favor of a resolution on decolonizing Puerto Rico.”)

able the Puerto Rican people to exercise their right to self-determination.<sup>188</sup>

Notwithstanding this scrutiny, the United States, perhaps not surprisingly, repeatedly thwarted U.N. efforts to condemn U.S. actions with respect to Puerto Rico.<sup>189</sup> In 1968, Ambassador Arthur Goldberg "pulled out all [the] stops" to keep Puerto Rico off the Decolonization Committee's agenda.<sup>190</sup> Representative Moynihan admitted that when he served as an ambassador to the U.N. he was able "to kill" the committee's efforts with respect to Puerto Rico.<sup>191</sup> More recently, Ambassador Jeane Kirkpatrick, upon learning that Puerto Rico's status might be put on the U.N.'s agenda, "made it clear to the nonaligned nations that, although abstention was understandable, a vote against the United States would carry penalties."<sup>192</sup>

Even today, as it decides how and when the Puerto Rican people will be allowed to vote on their political status, Congress has admitted that the United States's representations to the U.N. were

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188. *See id.* (referring to 1991 decolonization committee resolution requesting decolonization of Puerto Rico).

189. *See CARR, supra* note 117, at 340 ("The irritation that the hearings of the Decolonization Committee arouses in American breasts is understandable. A nation that prides itself on its liberal tradition does not take kindly to public accusations that it exercises 'a constant, systematic and planned policy of repression' in Puerto Rico."); *cf.* 137 CONG. REC. S2073-74 (1991) (statement of Rep. Moynihan) (noting that term "commonwealth" is often translated into Spanish as "estado libre asociado," referring to free associated state, which is different from commonwealth). *But see* Guevara, *supra* note 157, at 268 (noting Puerto Rico does not have autonomy of "commonwealth" nation or free associated state). The United States also attempted to gain political favor through the use of the term "compact" in Public Law 600. The status declaration of commonwealth, however, is a deceptive device that allowed the United States to convince the U.N. that Puerto Rico was self-governing, especially when one considers that a compact is essentially a contract between two parties that is typically modified only by mutual consent. Clearly, Puerto Rico did not, nor does not now have, the power to alter either Public Law 600 or Public Law 447. Congress, on the other hand, has the power, and has exercised it, to alter any Puerto Rican made law, including its constitution.

190. *See* FERNANDEZ, *supra* note 112, at 236 (discussing United States's attempt to hamper efforts to include Puerto Rico on Decolonization Committee's agenda).

191. *See* 137 CONG. REC. S3901 (1991) (statement of Rep. Moynihan) ("When I was the Permanent Representative, this issue came up and I said to vote to refer this matter to the committee on decolonization at the behest of Cuba would be regarded by our nation as an unfriendly act.").

192. CARR, *supra* note 117, at 363. The fact that the United States can so confidently make such a declaration is an example of its world power.

The United States has been sensitive to international accusations concerning Puerto Rico. For example, in response to Cuban condemnation of the United States's "imperialistic" relationship with Puerto Rico, the Senate passed Senate Resolution 35, "reaffirming the Senate's commitment to self-determination for the island." Deutch, *supra* note 89, at 692 (citing S. REP. NO. 120, 101st Cong., at 19, 20-21 (1989)).

inaccurate.<sup>193</sup> A recent House of Representatives report addressing this point notes that "those who suggest that U.S. diplomats overstated the degree of self-government achieved under the Constitution to get the U.N. to go along may be partially right."<sup>194</sup> The report goes on to note that "the 'compact' was for the creation of a form of local constitutional self-government, which [in effect] represented progress toward, but did not fulfill or completely satisfy, U.N. criteria for full self-government."<sup>195</sup>

#### IV. THE "POST-AUTONOMY" PLEAS FOR SELF-DETERMINATION

Many years after Puerto Rico was purportedly granted autonomy under Public Law 600, the nature and scope of the "compact" between the United States and Puerto Rico remained unclear. Not surprisingly, the leaders of Puerto Rico were not content with the so-called autonomy created by the commonwealth status.<sup>196</sup> In 1966, the Puerto Rican legislature enacted a bill requesting that Congress grant the Puerto Rican people the right to undertake a binding plebiscite or referendum whereby they could choose be-

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193. See H.R. REP. NO. 104-713, pt. 1, at 12 (1996) (discussing misleading U.S. representations concerning Puerto Rican autonomy).

194. See *id.* (noting that United States eventually clarified ambiguities regarding Puerto Rico's status in 1953, notified U.N. of Puerto Rico's limited self-government and required compatibility with Federal Constitution).

195. *Id.* at 14. In addition, congressional hearings held last year concerning the status question elicited an illuminating exchange between Representative Robert Torricelli of New Jersey and Carlos A. Romero-Barceló, the nonvoting Representative from Puerto Rico:

Mr. Romero-Barceló: Now if we are disenfranchised, we obviously are not self-governing. Is that correct?

Mr. Torricelli: I think that would be fair.

Mr. Romero-Barceló: So if we are not self-governing, that means that we are misrepresenting the position of Puerto Rico before the United Nations, because we say Puerto Rico is a self-governing commonwealth and we are not . . . .

*Examination of the Political Preferences of the U.S. Citizens of P.R., 1995: Joint Hearing Before the Subcomm. on the W. Hemisphere of the House Comm. on Int'l Relations*, 104th Cong. 26 (1995) (statements of Rep. Torricelli and Mr. Romero-Barceló).

196. See Román, *supra* note 78, at 128 (discussing Puerto Rican politicians' criticisms of Puerto Rico's status). One commentator noted that:

[t]hen Governor Carlos Romero Barcelo, a staunch supporter of statehood, criticized the Commonwealth as quasi-colonial, and stated that Puerto Rico is free to opt for the "vestiges of colonialism which characterize our relations with the United States."

. . . .

What became evident in these proceedings was that all the leaders of the Puerto Rican political parties were dissatisfied with the status quo (i.e., Commonwealth).

*Id.* at 127-28 (quoting Carr, *supra* note 117, at 358-59).

tween commonwealth, statehood or independence status.<sup>197</sup> Thereafter, Congress enacted Public Law 271, which created a commission to study the status of Puerto Rico.<sup>198</sup> This commission acknowledged the confusing status created by the new commonwealth by noting that "[n]o one, in or out of Congress, or in or out of Puerto Rico, knows exactly what the Commonwealth of Puerto Rico is."<sup>199</sup> The commission's efforts led to a call for a new referendum.<sup>200</sup>

In 1967, congressional inaction led the Puerto Rican people to hold a nonbinding plebiscite; the PDP, which supported an enhanced commonwealth status, obtained a majority after Puerto Rico's two other political parties balked at U.S. involvement in the process and called for an abstention from voting.<sup>201</sup> Ultimately, Congress created an ad hoc committee to examine implementing

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197. See FERNANDEZ, *supra* note 112, at 214-19 (discussing bill passed concerning plebiscite by Populares-controlled legislature and results of plebiscite itself). A plebiscite is a vote by the people of a state. Some Puerto Rican politicians alleged that the constitution of the commonwealth was a farce—a law that merely granted the Governor of Puerto Rico the right to appoint the territory's auditor and the justices of the Supreme Court of Puerto Rico. See Román, *supra* note 78, at 111 (manifesting discontent on behalf of politicians over new constitution's effects on Puerto Rican society and comparing results to Elective Governor Act of 1947).

198. See Act of Feb. 20, 1964, Pub. L. 88-271, 78 Stat. 17 (1964) (creating and describing committee to study status of Puerto Rico).

199. 109 CONG. REC. H20,124 (1963) (statement of Rep. O'Brien). Representative O'Brien stated:

What is Puerto Rico? What is its ultimate destiny?

Some have told us that what the commission did here in 1950 was meaningless rhetoric and statutory doubletalk. They insist that Puerto Rico is still, in fact, a colony, a possession, and that the self-government we granted is illusory and subject to instant cancellation at the whim of Congress.

Others argue that when we created the first and only commonwealth under the American flag we entered into an irrevocable compact from which there could be no withdrawal and that we actually fitted a sovereign national into the American mosaic.

Somewhere between these two claims lies the truth . . .

*Id.* (statement of Rep. O'Brien).

200. See *id.* (stating commission wished to find out Puerto Rican people's opinion on status question before taking further action).

201. See Shaw, *supra* note 60, at 1022 (stating results of nonbinding plebiscite—60.5% voted in favor of "perfected" Commonwealth, 38.9% in favor of statehood, and 0.6% voted in favor of independence); see also Fernandez, *supra* note 112, at 195 (stating report prepared for President Carter addressing U.S. tampering with 1967 plebiscite acknowledges "a record of a decade of hanky panky . . . What is most damaging is the FBI swashbuckling at the time of the plebiscite (is that self-determination?) and even at the time of the 1968 general election.").

the results of the plebiscite, but largely ignored the results because it never agreed to be bound by the plebiscite.<sup>202</sup>

Subsequently in 1973, President Nixon, like President Roosevelt several decades earlier, established an advisory group to examine the status question.<sup>203</sup> Likewise, days before the end of his term, President Ford introduced a statehood bill, calling for congressional hearings on the subject.<sup>204</sup> President Carter also chose the road most traveled and appointed a committee to examine Puerto Rico's economic problems.<sup>205</sup> Throughout the 1970s efforts to enact legislation to address the status issue died in congressional committees.<sup>206</sup>

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202. See CARR, *supra* note 117, at 94-95 (noting that "[n]othing came of the committee's recommendation"). "President Ford, who acted as if the proposals of the ad hoc committee simply did not exist, unexpectedly declared his preference for statehood. He presented a statehood bill to Congress, but it died away as previous bills had done." *Id.* at 95.

The ad hoc committee, created in 1973, grew out of the United States-Puerto Rican Commission on the Status of Puerto Rico ("Status Commission"). See *id.* at 93 (noting Status Commission recommended using ad hoc committee to generate solutions). The committee, however, failed to unite the various Puerto Rican political parties; created by a PDP government that favored "free association" status, it did not properly represent the NPP, which favored statehood. See *id.* ("Keeping the word 'state' in Free Associated State . . . turned Puerto Ricans into 'spongers' who did not pay federal taxes but who were bailed out by 'an unaware Congress.' 'There is no dignity in being beggars; allow us to acquire dignity . . . by paying federal taxes as a state.'").

Carr explained the recommendations of the committee:

The United States would continue to be responsible for international relations and defense, but Puerto Rico could make educational, cultural, sporting, commercial, and technical agreements with other countries consistent with the interests of the United States and as agreed to by the president and the governor. The common market and the customs and excise rebates would remain, but in consultation with the United States, Puerto Rico could levy its own tariffs and the island would enjoy observer status on international trade negotiations. It also would have powers to control immigration and regulate its own wage levels. Hitherto unrepresented in the United States Senate, it would be represented in both Houses. Federal laws would apply only if it was specifically stated that they referred to Puerto Rico. The governor could object to any law that adversely affected the island and Congress would then determine whether the law was essential to the interests of the United States.

*Id.* at 95.

203. See *Puerto Rico's Status Before the U.N.*, reprinted in 3 PUERTO RICO: POLITICAL STATUS REFERENDUM, *supra* note 170, at 17-18 (1992) (attempting to explore ways to further commonwealth status).

204. See *id.* at 19 ("In January, 1977, a Puerto Rican statehood bill was introduced in the House of Representatives and was referred to the Committee on Interior and Insular Affairs.").

205. See *id.* at 20 (stating that President Carter appointed Study Group on Puerto Rico to examine its economic problems, but status issue was not covered).

206. See *id.* at 19-20 (outlining legislation addressing status issue).

### A. *The 1993 Plebiscite*

In early 1989, the leaders of Puerto Rico's three political parties again expressed a desire to choose their own fate, asking President Bush and Congress to enact legislation that would "guarantee that the will of the people once expressed shall be implemented through an act of Congress."<sup>207</sup> The Puerto Rican political leaders formally advised the United States that "*the people of Puerto Rico wish to be consulted as to their preference with regards to their ultimate political status.*"<sup>208</sup> The joint letter noted "*that since Puerto Rico came under the sovereignty of the United States of America through the Treaty of Paris in 1898, the People of Puerto Rico have not been formally consulted by the United States of America as to their choice of their ultimate political status.*"<sup>209</sup> In response, President Bush in his 1989 State of the Union Address requested Congress "to take the necessary steps to allow the people [of Puerto Rico] to decide [their status] in a referendum."<sup>210</sup> The Committee on Energy and Natural Resources of the U.S. Senate, the successor to the former Committee on Interior and Insular Affairs, accordingly sponsored legislation that provided for a process to resolve the status question.<sup>211</sup> Congress, however, chose to delay.<sup>212</sup> After four years of lobbying, the Puerto Rican people grew impatient and called for a binding plebiscite.<sup>213</sup> Despite the fact that the Puerto Rican people, by and through their political leaders, made clear their desire for a binding plebiscite,

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207. *A Chronology of the Process for a Referendum on the Status of Puerto Rico 1989-1991*, reprinted in 3 PUERTO RICO: POLITICAL STATUS REFERENDUM, *supra* note 170, at xxi.

208. Letter from Baltasar Corrado Del Rio, President, New Progressive Party, Rafael Hernandez-Colón, President, Popular Democratic Party & Ruben Berrios Martinez, President, Puerto Rican Independence Party, to George Bush, President, United States of America (Jan. 12, 1989), reprinted in 1 PUERTO RICO: POLITICAL STATUS REFERENDUM 12-13 (1992) (emphasis added) [hereinafter Letter from Baltasar Corrada del Rio]; see H.R. REP. NO. 104-713, pt. 1, at 2 (1996) (stating Puerto Rican people have not been formally consulted "as to their choice of their ultimate political status").

209. Letter from Baltasar Corrada Del Rio, *supra* note 208, at 13 (emphasis added); see H.R. REP. NO. 104-713, pt. 1, at 2 (discussing history of Puerto Rico's political status).

210. See 137 CONG. REC. S2073 (1991) (statement of Sen. Moynihan) (quoting President Bush in his first address as President to joint session of Congress, Feb. 9, 1989).

211. See Gonzalez, *supra* note 6, at 311-13 (noting ultimately three bills were introduced to provide for referendum process).

212. See 137 CONG. REC. S2073 (1991) (statement by Sen. Moynihan) ("The President said let there be a vote. Well, we waited.").

213. See 137 CONG. REC. S3900, S3901 (1991) (noting 101st Congress' failure to act); cf. Shaw, *supra* note 60, at 1054 (noting 1993 plebiscite results showed Puerto Ricans want change in status).



the results of any plebiscite without congressional approval would not be self-executing and instead would allow only for congressional response.<sup>214</sup>

Eventually, congressional inaction resulted in the Puerto Rican legislature passing legislation on such a nonbinding local plebiscite.<sup>215</sup> The result of the 1993 plebiscite was a narrow victory for the party supporting an enhanced commonwealth status.<sup>216</sup> Although Senator Simon quoted one writer as saying that "it verges on the dishonorable to invite Puerto Ricans to hold a referendum without assurance that Congress will heed the results,"<sup>217</sup> Congress refused to accept them.<sup>218</sup> In fact, even before the vote, Congressman Young of Alaska, the sponsor of a bill currently before Congress that attempts to resolve Puerto Rico's colonial dilemma, expressed concerns with what he perceived were "the highly unrealistic definitions of what constitutes the status choices of commonwealth and independence."<sup>219</sup> Congressman Young's concerns apparently stemmed from the fact that despite Supreme Court and executive actions upholding Congress's plenary power over Puerto Rico, the procommonwealth party attempted in the 1993 ballot to unilaterally redefine Puerto Rico's status vis-à-vis the United States.<sup>220</sup> The procommonwealth party had proposed an unrealis-

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214. See Shaw, *supra* note 60, at 1054-55 (stating plebiscite was nonbinding).

215. See *id.* (discussing 1993 plebiscite and stating it was nonbinding).

216. See 140 CONG. REC. S71 (daily ed. Jan. 25, 1994) (statement of Sen. Simon) (attaching article written by former Puerto Rico Governor Carlos Romero-Barcelo) ("'Commonwealth' garnered 42.6 percent [of the vote], 'statehood' 43.6 percent, and 'independence' 4.4 percent.").

217. See 137 CONG. REC. S3462 (1991) (statement of Rep. Simon) (inserting editorial article written by Tom Wicker of *New York Times* claiming that commonwealth status for Puerto Rico is good and statehood status would not satisfy needs of Puerto Rico). Simon disagreed with Wicker's position and responded in his weekly column. See *id.* (stating commonwealth status must eventually give in to statehood or independence).

218. See 142 CONG. REC. E988 (daily ed. June 4, 1996) (statement of Rep. Gallegly) (commenting on Congress' reluctance to include definition of "commonwealth" on 1993 plebiscite ballot).

219. See 139 CONG. REC. E2858 (1993) (statement of Rep. Young) (discussing Puerto Rico's status referendum and expressing concern over possibility of misleading definitions of statuses on referendum ballot).

220. See *id.* (discussing possibility of inaccurate definition of "commonwealth" appearing on ballot); *cf.* Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (holding commonwealth status as unincorporated territory subject to plenary authority of Congress pursuant to Territory Clause of U.S. Constitution); Rogers v. Bellei, 401 U.S. 815, 831 (1971) (finding Congress can even change the citizen status of Puerto Ricans by either withholding citizenship or prescribing periods of U.S. residency as conditions precedent to citizenship "without constitutional question"); United States v. Sanchez, 992 F.2d 1143, 1152-53 (1993) (ruling Congress can unilaterally change status of Puerto Rico); H.R. REP. NO. 104-713, pt. 1, at 20 (1996)

tic ballot definition for the commonwealth status, which included promises of (1) a binding commonwealth relationship giving Puerto Rico a "mutual consent" veto power over acts of Congress; (2) converting the current status into a permanent union with the United States; (3) guaranteeing citizenship equivalent to birth or naturalization in one of the states; and (4) increased federal outlays to give Puerto Rico parity with the states for taxpayer-funded social spending.<sup>221</sup> Representative Young, when responding to the commonwealth supporters' unrealistic promises, essentially confirmed the true nature of the relationship:

It is ridiculous to suggest that the United States would ever agree to a commonwealth with permanent union between Puerto Rico and the United States. . . . The United States will not set aside over two centuries of reliance upon [the United States Constitution] to be "bound by a bilateral pact that could not be altered, except by mutual consent."<sup>222</sup>

In the clearest example of the United States's power over the status of Puerto Rico, Congress simply rejected the procommonwealth party's efforts to unilaterally claim a new status other than a colonial one and expressed its disapproval with the process leading to the plebiscite by simply refusing to act on it.<sup>223</sup> In 1994, President Clinton established an interagency working group to review and hold hearings on the status question.<sup>224</sup> After a year of congressional silence, the Puerto Rican legislature was obviously frustrated.

#### B. *House Bill 3024*

After Congress refused to act on the 1993 plebiscite—in perhaps what is the clearest acknowledgment of its colonial status—the Puerto Rican legislature, on December 14, 1994, again pleaded for congressional action by adopting Concurrent Resolution 62, which asked the 104th Congress, "if unwilling to accede to and implement

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(noting U.S. Department of State intervention to prevent Puerto Rico from negotiating tax treaties with foreign governments).

221. See H.R. REP. NO. 104-713, at 18 (restating ballot definition promises of local political party endorsing "Commonwealth" in 1993 local status vote).

222. See 139 CONG. REC. E2858 (1993) (statement of Rep. Young) (stating his opinion on United States's position regarding Puerto Rico's status).

223. See 142 CONG. REC. E988 (daily ed. June 4, 1996) (statement of Rep. Gallegly) (critiquing revision of United States-Puerto Rico Political Status Act).

224. See *Plebiscite Joint Hearing*, *supra* note 17, at 5 (discussing rationale behind interagency working group formulated by President Clinton).

the definition of 'Commonwealth' from the 1993 plebiscite ballot, to state "the specific status alternatives that it is willing to consider, and the measure it recommends the people of Puerto Rico should take as part of the process to solve the problem of their political status."<sup>225</sup>

Almost a year later, a congressional committee held yet more hearings regarding the plebiscite results and the status question.<sup>226</sup> After two years of hearings, congressional representatives finally responded to the plebiscite by introducing legislation that required Puerto Rico to undertake at least one more plebiscite under the terms and conditions set forth by Congress.<sup>227</sup> On March 6, 1996, Representative Young cosponsored a bill with House Speaker Newt Gingrich entitled the "United States-Puerto Rico Political Status Act," which would provide for a new series of plebiscites.<sup>228</sup> During the hearings on the bill, Representative Gallegly of California—in part to avoid the problems created by the "commonwealth" definition in the 1993 plebiscite—proposed amendments that would have Congress dictate the actual language that the Puerto Rican political parties would use to describe their respective status options.<sup>229</sup> The congressional committee that reviewed the plebiscite rejected the 1993 commonwealth option because it:

contained proposals to profoundly change rather than continue the current Commonwealth of Puerto Rico government structure. Certain elements of the common-

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225. See 142 CONG. REC. E988 (daily ed. June 4, 1996) (statement of Rep. Gallegly) (discussing actions taken by Puerto Rico's legislature in effort to promote congressional action). It is truly an embarrassment and an intolerable insult to human dignity that the Puerto Rican people have had to, time and time again, ask Congress for permission to exercise the most basic of all rights relating to choice.

226. See *id.* (noting that hearings were conducted during which representatives of each principal political party were afforded opportunity to testify or submit written statements).

227. See *Plebiscite Joint Hearing*, *supra* note 17, at 2 (stating Joint History's purpose was to provide Congress with basis for formulating legislative response to "voice of the people of Puerto Rico" as expressed in 1993 plebiscite); *1996 Hearings*, *supra* note 14, at 18 (discussing legislative response of U.S. Congress, United State-Puerto Rican Political Status Act, which calls for constructive collaboration between U.S. government and Puerto Rican people regarding Puerto Rico's political status); see also Juan M. Garcia-Passalacqua, *The United States: Ethnocentric or Pluralistic?*, WASH. POST, June 7, 1996, at A23 (stating Puerto Rico needs to have another plebiscite prior to 1998 to determine whether Puerto Rico will take road to statehood or road to independence).

228. See H.R. 3024, 104th Cong. (1996) (introducing bill to provide process to lead Puerto Rico to full self governance).

229. See 142 CONG. REC. E988 (daily ed. June 4, 1996) (statement of Rep. Gallegly) (noting under U.S. Constitution only Congress can determine what political status options it will consider).

wealth option, including permanent union with the United States and guaranteed U.S. citizenship, can only be achieved through full integration into the U.S. leading to statehood. . . . Thus, there is a need for Congress to define the real options for change and the true legal and political nature of the status quo, so that the people can know what the actual choices [Congress is willing to provide them with] will be in the future.<sup>230</sup>

Congress's attempt to avoid further problems with the definition of "commonwealth," which its supporters had the audacity to use in the 1993 ballot, confirms the United States's colonial prerogative.<sup>231</sup> Representative Gallegly aptly identified America's imperialistic prerogative when he noted that, under the U.S. Constitution, only Congress could determine what political status of its possession it is willing to consider.<sup>232</sup>

While Congress is still toying with various versions of House Bill 3024, the bill provides a confusing and cumbersome referendum process that will be unlikely to resolve the status question.<sup>233</sup> If passed without major revisions, the process established by House

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230. See 142 CONG. REC. E299 (daily ed. Mar. 6, 1996) (statement of Rep. Young).

231. See *id.*

232. See 142 CONG. REC. E988 (daily ed. June 4, 1996) (statement of Rep. Gallegly) (illustrating Chairman Young's commitment to open and bipartisan approach regarding Concurrent Resolution 62 and political status of Puerto Rico).

233. See H.R. 4281, 104th Cong. (1996) (providing for referendum process to determine Puerto Rico's political status). Although House Bill 4281 recognizes Congress's "historical" commitment "to take into consideration the freely expressed wishes of the people of Puerto Rico regarding their future political status" as "consistent with respect for the right of self-determination in areas which are not fully self-governing," it nonetheless states that this recognition "does not constitute a legal restriction or binding limitation on the Territorial Clause powers of Congress to determine a permanent status of Puerto Rico." *Id.* § 5(3).

The procedures outlined in House Bill 4281 can, like those set forth in previous legislative efforts, continue for years before a resolution is reached.

To ensure that the Congress is able on a continuing basis to exercise its Territorial Clause powers with due regard for the wishes of the people of Puerto Rico respecting resolution of Puerto Rico's permanent political status, in the event that a referendum conducted under section four is inconclusive as provided in this subsection, or a majority vote to continue the Commonwealth structure as a territory, there shall be another referendum in accordance with this Act prior to the expiration of a period of four years from the date such inconclusive results are certified or determined. This procedure shall be repeated every four years, but not in a general election year, until Puerto Rico's unincorporated territory status is terminated in favor of a recognized form of full self-government in accordance with this Act.

*Id.* § 5(4).

Bill 3024 will almost ensure that Puerto Rico remains a U.S. colony. House Bill 3024 provides that the status question shall be resolved in three stages.

This initial decision stage calls for a plebiscite to be held by December 31, 1998.<sup>234</sup> In the original version of the initial decision stage, the people of Puerto Rico were to choose between (1) a path leading to independence and (2) a path leading to U.S. statehood.<sup>235</sup> A subsequent version of the bill reported from the House Committee on Resources contains an initial decision stage with a two-part ballot in which the people of Puerto Rico will choose between (1) maintenance of the commonwealth structure or (2) a process leading to self-government.<sup>236</sup> Irrespective of his or her vote in the first part, the voter would then vote on part two of the initial decision stage's ballot.<sup>237</sup> If a majority of the voters on the first part approves full self-government of Puerto Rico, then, on the second part, they would be asked to identify their preferred path to self-government.<sup>238</sup> The second part of the ballot provides the voter the option of either self-governance through (1) independence or (2) statehood.<sup>239</sup> Interestingly, the statehood option is not depicted in a very attractive light. For example, the ballot does not specifically address the economic benefits of statehood, but does refer to its burdens, including the obligation to pay federal taxes and the application of mandatory, presumably English-only, language laws.<sup>240</sup>

If the results of the initial stage's ballots establish a majority vote for a process leading to self-government either by choosing independence or statehood, the second, or transition, stage of House Bill 3024 begins.<sup>241</sup> Within 180 days of receipt of the results of the initial stage referendum, the President shall submit legislation to Congress proposing a plan for a transition period that shall last a

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234. See H.R. 3024, 104th Cong. § 4(a) (1996) (stating referendum will be held in accordance with Puerto Rico's electoral law and other relevant statutes).

235. See *id.* (describing various attributes of both options).

236. See H.R. 3024, 104th Cong. § 4 (1996) (changing choices from questions with attributes of each choice described to positive statements reflecting voter's status choice).

237. See *id.* (stating referendum "shall" be on two parts presented side-by-side).

238. See *id.* (asking, "If full self-government is approved by the majority of voters, which path leading to full self-government for Puerto Rico do you prefer to be developed . . . ?").

239. See *id.* (describing various attributes of each choice).

240. See *id.* (stating that statehood means agreeing that Puerto Rico "adheres to the same language requirement as in the several States").

241. See *id.* § 5(1).

minimum of ten years and lead to full self-governance for Puerto Rico.<sup>242</sup> Then, within 180 days after Congress enacts a transition plan, Puerto Rico will hold a referendum to approve the plan.<sup>243</sup> This referendum must also be approved by a majority of the voters or the process will be terminated.<sup>244</sup> If the plan is approved, the President will finally propose legislation for the implementation of self-government for Puerto Rico.<sup>245</sup> Congress will then consider enacting legislation to effectuate the choice of the Puerto Rican people.<sup>246</sup> Within 180 days after the enactment of the terms of implementation for self-governance, a third referendum will be held in Puerto Rico to approve the terms of implementation for self-governance.<sup>247</sup> Again, approval must be given by a majority of the valid votes cast.<sup>248</sup>

While this legislation “at first blush” appears to be a legitimate step towards achieving Puerto Rican autonomy, the legislation probably will not effectuate any change in the political status for the people of Puerto Rico. The bill simply contains too many hurdles for the Puerto Rican people to overcome and too many procedural “outs” for Congress to terminate the process. For example, the Puerto Rican people must undertake three nationwide referenda in order to finalize its status preference. The people of Puerto Rico must undertake a referendum on the preferred status option, but the process is interrupted and Puerto Rico may remain a colony *ad infinitum* if during the initial decision stage the results do not favor changing the status of Puerto Rico. If the Puerto Rican people choose to change their status under the confusing initial stage’s two-part referendum, Congress must then enact a transition plan for a change in the political status. While this transition period will last ten years, the Puerto Rican people must undertake another referendum to approve this plan, the result of which is far from certain.

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242. *See id.* (stating that legislation should be developed in consultation with officials from Puerto Rico’s three governmental branches, its principle political parties and “other interested persons as may be appropriate”).

243. *See id.* § 4(b)(3)(A) (requiring results to be certified to President).

244. *See id.* § 3(B).

245. *See id.* § 4(c)(1).

246. *See id.* § 4(c)(2).

247. *See id.* § 4(c)(3) (stating that results will be certified to President).

248. *See id.* § 4(c)(3)(B).

C. *Senate Bill 2019*

Shortly after the introduction of House Bill 3024, the Senate proposed legislation that, while also flawed, provides for a better procedure than House Bill 3024. On August 2, 1996, Senator Craig introduced Senate Bill 2019 “[t]o provide for referenda to resolve the political status of Puerto Rico.”<sup>249</sup> While still cumbersome, this bill potentially provides greater clarity and a more streamlined process.

This bill provides for a two-step process for answering the status question.<sup>250</sup> The first step involves a referendum that is to be held by the end of 1998. As with House Bill 3024, this first ballot has a confusing two-part voting arrangement. In part one, the voter is to choose between commonwealth status and either separate sovereignty or statehood.<sup>251</sup> Part two of the initial referendum presents voters with a choice between two options for ending the current territorial status.<sup>252</sup> The two alternatives are (1) separate sovereignty or (2) statehood.<sup>253</sup> The statehood option in this bill, unlike House Bill 3024, which highlights perceived negatives of the option, actually notes that under statehood the people of Puerto Rico will have equal rights as U.S. citizens.<sup>254</sup>

Senate Bill 2019 also provides more specific, but no less confusing, instructions to voters. Specifically, with respect to the second part of the first ballot, this bill requires that the voter be informed that he or she “may vote on Part Two regardless of how the voter voted on Part One, or even if they did not vote on Part One.”<sup>255</sup> The voters are also to be informed that part two of the ballot is to determine which self-governance option the voter prefers should a

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249. See S. 2019, 104th Cong. (1996) (providing for referenda to resolve political status of Puerto Rico).

250. See *id.* § 2 (describing format for answering status question in Puerto Rico).

251. See *id.* § 2(c)(2) (offering residents of Puerto Rico choice between commonwealth status or path to separate sovereignty or statehood).

252. See *id.* § 2(c)(2)(B) (offering voters choice between separate sovereignty and full integration leading to statehood for ending current territorial status).

253. See *id.* (noting that options for ending current territorial status include separate sovereignty and statehood).

254. See *id.* (“United States citizens in Puerto Rico will have full and equal rights and duties of United States citizenship, including voting rights in elections for President and Vice President . . .”).

255. *Id.* § 2(c)(3)(B) (explaining voting process to Puerto Rican citizens).

majority of the voters in part one decide to end the commonwealth status.<sup>256</sup>

The next step of Senate Bill 2019's process is the implementation stage. This step provides that if a majority of the voters select statehood or separate sovereignty, the President, according to the results of the referendum, and not later than 180 days after it, is to submit to Congress legislation providing for the admission of Puerto Rico as a state of the Union or legislation providing a plan for transition to independence.<sup>257</sup> With either option, the legislation shall include a transition plan for the implementation of the Puerto Rican people's choice.<sup>258</sup>

In addition to providing fewer referenda than House Bill 3024, the Senate Bill, unlike the initial version of House Bill 3024, establishes a procedure for the potential future attainment of self-determination if a majority vote in either referendum is not met.<sup>259</sup> The Senate Bill, for the specific purpose of ensuring that the Puerto Rican people's "right . . . to self-determination is respected, and that the people periodically are afforded the opportunity [to freely] express their wishes," rightly provides that if a majority of the voters approve the continuation of the current status, or if they reject a transition plan, referenda on the status issue are to be held every four years thereafter unless Congress provides otherwise.<sup>260</sup>

Notwithstanding its benefits, Senate Bill 2019 also suffers from some of the same flaws as House Bill 3024 because it provides Congress with too many "outs." For example, the Senate Bill does not set forth the duration of the transition plan.<sup>261</sup> This shortcoming could result in legislation which would, much like House Bill 3024, provide for a ridiculously long transition period. In addition, the Senate Bill's procedure for subsequent referenda, if the status is not

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256. *See id.* (offering self-governance options, either in form of separate sovereignty or statehood, to replace commonwealth status that was overruled in part one of ballot process to determine Puerto Rico's political status).

257. *See id.* § 3 (summarizing duties of President and Congress during implementation stage of chosen political status for President and Congress).

258. *See id.* (ensuring Puerto Rican people that their right to self-determination is respected).

259. *See id.* § 3(a) (noting that if majority of voters approve continuation of current commonwealth status or reject transition plan, referenda on Puerto Rico's future political status will be held every four years thereafter).

260. *Id.* (noting right of Puerto Rican voters to approve continuation of current status or reject proposed transition status).

261. *See id.* § 2(b)-(c) (outlining format to change Puerto Rico's political status by end of 1998).



changed, may be subsequently altered or revoked by Congress.<sup>262</sup> Congress could thus remove the only procedure to ensure a change in Puerto Rico's status.

#### D. *House Bill 4281*

On September 28, 1996, Representative Young, along with Representatives Burton and Gallegly, introduced the newest version of House Bill 3024, House Bill 4281, also entitled the United States-Puerto Rico Political Status Act.<sup>263</sup> The new bill stemmed in large part from nativist concerns regarding House Bill 3024 raised by certain Republican leaders. Specifically, Representative Young explained that key sponsors of House Bill 3024 were not willing to go to the House floor and ask for approval of House Bill 3024 without imposing the requirement that English be the exclusive language of instruction in public schools in Puerto Rico should it become a state.<sup>264</sup> This requirement was insisted upon notwithstanding its constitutional infirmity under *Coyle v. Smith*.<sup>265</sup> English shall be Puerto Rico's official language in federal offices if statehood is the voters' ultimate decision.<sup>266</sup>

#### E. *House Bill 856*

The House of Representative's latest effort to address the plebiscite issue appeared when the United States-Puerto Rico Political Status Act was reintroduced before the 105th Congress on February 27th, 1997 as House Bill 856.<sup>267</sup> This bill largely tracks the lan-

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262. See *id.* § 3 (noting that power of Congress to alter or revoke bill's procedure for subsequent referenda is not changed).

263. See H.R. 4281, 104th Cong. (1996) (establishing three-stage process for Puerto Rican self-determination); see also Interview by Librarian Denise Gibson with Rep. Young's office (Dec. 12, 1996) (discovering that House Bill 3024 never made it to House floor and Representative Young, with House Bill 4281, reintroduced essentially same bill). House Bill 4281 was initially introduced a day earlier on September 27, 1996 as House Bill 4228. H.R. 4228, 104th Cong. (1996).

264. See 142 CONG. REC. E1830 (daily ed. Sept. 30, 1996) (statement by Rep. Young) (introducing new sections of House Bill 4281 addressing issue of English as Puerto Rico's official language and supporting process for "free and informed self-determination under the United States-Puerto Rico Political Status Act when it becomes a law").

265. 221 U.S. 559 (1911) (holding that Congress cannot impose upon new state, as condition to its admission to union, restrictions which render it unequal to other states).

266. See 142 CONG. REC. E1830 (daily ed. Sept. 30, 1996) (commenting on House Bill 4281's impact should statehood be chosen as new political status).

267. See H.R. 856, 105th Cong. (1997) (establishing process leading to full self-government for Puerto Rico). House Bill 856 was introduced by Rep. Young who also introduced House Bill 3024 to Congress in 1996. See H.R. 3024, 104th Cong. (1996).

guage of House Bill 4281 and, like House Bills 4281 and 3024, provides for a three-stage process to achieve self-determination.<sup>268</sup> House Bills 856 and 3024 address the initial stage of the self-determination process differently. House Bill 3024 has a two-question ballot in the initial referendum, while House Bill 856 provides a choice of three options: commonwealth, separate sovereignty or statehood.<sup>269</sup> These bills also differ in that House Bill 3024 requires a transition plan of not less than ten years, while House Bill 856 requires a more expeditious transition plan of not more than ten years.<sup>270</sup>

The most significant deviation from the text of House Bill 3024 is the English-first mandate present in House Bill 856. Specifically, House Bill 856 provides that, if the Puerto Rican people choose statehood status, English will become the "official language of business and communication in Federal courts and Federal agencies as made applicable by Federal law to every other State, and Puerto Rico is enabled to expand and build upon existing law establishing English as an official language of the State government, courts, and agencies."<sup>271</sup> Compared with House Bill 856, House Bill 3024 is vague as to any language requirement: "Puerto Rico [will] adhere to the same language requirement as in the several states."<sup>272</sup> House Bill 856's official language requirement is derived from an amendment written by Representative Gerald Solomon, who stated:

It must also be understood that my support for English as official language does not mean that I am pushing for Puerto Rico or anyone else for that matter to speak English only. I simply believe it should be the first and foremost

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268. Compare H.R. 3024, § 4 (providing three-stage process with two-part ballot for first stage), with H.R. 4281, § 4 (streamlining House Bill 3024's process by having only one-part ballot question for first stage), with H.R. 856, § 4 (providing three-stage process with one part ballot for first stage). Although House Bill 856 tracks House Bill 4281's language, there is a significant difference in their respective structures. Compare H.R. 856, § 5(c)(2) (requiring another referendum be held in 10 years if majority chooses commonwealth status), with H.R. 4281, § 5(c)(4) (requiring, in event that vote is inconclusive or majority of voters choose commonwealth status, referenda to be held every four years until unincorporated territory status terminated in favor of full self-government).

269. Compare H.R. 3024, § 4(a) (creating two-part ballot for voters to determine if they want self-government or commonwealth status and, if they choose self-government, what form they want), with H.R. 856, § 4(a) (creating single ballot requiring voters to choose one of three options).

270. Compare H.R. 3024, § 4(b)(1)(A) (specifying transition period cannot be less than 10 years), with H.R. 856, § 4(b)(1)(A) (specifying transition period cannot be more than 10 years).

271. H.R. 856, § 4(a)(C)(7).

272. H.R. 3024, § 4(a).

language of official discourse. Should this bill reach the floor this year, I want to make it clear that I will offer an amendment to the bill on this issue and judging from previous house support for making English the official language I believe it will be adopted.<sup>273</sup>

Another major difference in House Bill 856, unlike the amended version of House Bill 3024, is that if commonwealth status is chosen in the initial stage referendum, further referenda will be held in accordance with the act but not less than once every ten years.<sup>274</sup> If, however, either of the two subsequent referenda in the transition and implementation stages are inconclusive the process may be delayed or terminated.<sup>275</sup> House Bill 856, then, may stall the process leading to self-determination and prolong Puerto Rico's status as a commonwealth.

#### F. *Senate Bill S. 472*

On March 19, 1997, Senator Larry Craig introduced Senate Bill 472, the Senate's latest effort to provide a referenda process for Puerto Rican self-determination. With the exceptions of the English language requirement and a limit of ten years for the transition stage, Senate Bill 472 tracks the language of House Bill 856. If, however, House Bill 856 or Senate Bill 472 is enacted without amendments, the new law will likely become an ill-fated attempt to change Puerto Rico's status problem, resulting in a failure for the Puerto Rican people. A more prudent process would be for Congress to remove the procedural "outs" in both bills and streamline their cumbersome processes.<sup>276</sup> First, the initial ballot on the key status choice should be the only one that mandates a majority vote. This is the most consequential vote—whether to change Puerto Rico's status. The remaining votes on the transition and implemen-

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273. *Rules Committee Hearing on H.R. 3024, The United States-Puerto Rico Political Status Act*, 1996 WL 536469 (Sept. 26, 1996) (opening statement of Gerald Solomon, Chairman of the Rules Committee).

274. *Compare* H.R. 856, § 5(c)(2) ("[I]n the event that a referendum . . . does not result in a majority vote for separate sovereignty or statehood, there is authorized to be further referenda in accordance with this Act, but not less than once every 10 years."), *with* H.R. 3024, § 5(c)(2) (stating if Puerto Ricans do not choose full self-governance through either statehood or separate sovereignty, Puerto Rico will remain unincorporated territory).

275. *See* H.R. 856, § 4(b)-(c) (providing no mechanisms for future referenda if transition or implementation plan is not approved by majority vote).

276. *See* S. 472, 105th Cong. (1997) (establishing three-stage process for Puerto Rican self-determination). Obviously, consulting the people of Puerto Rico for their views is essential for a system to ensure an expression of their free will.

tation stages should be alien to advisory opinions of the Puerto Rican people to Congress. These votes should not be the basis to stall or terminate the referendum process. This process will increase the probability that the process will not be prematurely terminated. Further, House Bill 4281's official English language requirement should be removed because culture and nationalistic pride are incredibly important concepts for the Puerto Rican people, and an English language requirement may lead to future efforts to cloud the status debate.<sup>277</sup> In addition, Congress should stop treating the residents of Puerto Rico differently than other U.S. citizens by making English a precondition to statehood.<sup>278</sup>

Moreover, if the United States truly wants an immediate end to its colonial possession, the transition and implementation process should not take up to a decade to complete. The United States, in consultation with Puerto Rico, could establish a short, three- or four-year transition and implementation period without jeopardizing the integrity of the process or causing undue hardship to either side.<sup>279</sup> Under this process (1) there could be cooperation between the United States and Puerto Rico; (2) the U.N. could have the right to observe and comment on the process; and (3) adequate funding for all Puerto Rican political parties should be achieved through a form of short-term sales or other limited tax hikes. Such a procedure may increase the likelihood of a true manifestation of free will of the Puerto Rican people.

V. THE CONSEQUENCES OF THE COLONIZER WHO REFUSES:  
CULTURAL HEGEMONY AS MANIFESTED THROUGH  
POLITICAL, SOCIAL AND ECONOMIC DEPENDENCE

A. *Social and Political Dependence*

The century-long United States-Puerto Rico colonial relationship has remained in place largely because of Puerto Rico's social, political and economic dependence on the United States. The colonial relationship, to use Congress's language, has thus "rewarded passivity and encouraged dependence."<sup>280</sup> This Article will now il-

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277. For a further discussion on the impact of language on the status debate, see Román, *supra* note 41, at 1-80.

278. See *Coyle v. Smith*, 221 U.S. 559, 559 (1911) (recognizing constitutional infirmity of preconditions to statehood that would render new state unequal to others).

279. See, e.g., 1996 *Hearings*, *supra* note 14, at 21 (summarizing Governor Rosello's suggestions regarding transition period duration).

280. For a complete discussion of the colonial relationship between the United States and Puerto Rico, see *supra* notes 89-141 and accompanying text.

lustrate how the relationship has not only "undermined national sovereignty, but also national character."<sup>281</sup> In fact, casually reviewing the history of the United States-Puerto Rico relationship, one can question the Puerto Rican people's acquiescence and arguable approval of colonialism. Some have termed the relationship "colonialism by consent."<sup>282</sup> To support this point, critics of the Puerto Ricans' call for self-determination can point to the post-1950 victories of the commonwealth status in each of the territory's three countrywide referenda.

The notion of colonialism by consent relates to the concept of cultural hegemony, which addresses the question of dominance and subordination in modern capitalist societies.<sup>283</sup> Although insufficient attention has been devoted to identifying the precise meaning of the concept, cultural hegemony is generally recognized as "the 'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is 'historically' caused by the prestige . . . which the dominant group enjoys because of its position and function in the world of production."<sup>284</sup> The proletariat, or the subordinate groups, "wear their chains willingly. Condemned to perceive reality through the conceptual spectacles of the ruling class, they are unable to recognize the nature or extent

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281. For a complete discussion of the national character of Puerto Rico as a result of U.S. colonialism, see *supra* notes 142-66 and accompanying text.

282. See Aleinikoff, *supra* note 89, at 33 (illustrating Puerto Rico's struggle to achieve autonomy from United States).

283. See generally T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AMER. HIST. REV. 567 (1985) (analyzing dominance and subordination in modern capitalist societies).

284. *Id.* at 568. But see JOSEPH V. FEMIA, GRAMSCI'S POLITICAL THOUGHT 23 (1981) (noting that Antonio Gramsci's concept of cultural hegemony "has become one of those fashionable political catchwords which is often invoked but seldom properly defined"). Another writer notes that "Gramsci painted a complex picture of how the dominant culture rules with the consent of the governed by shaping a 'hegemony' of values, norms, perceptions, and beliefs that 'helps mark the boundaries of permissible discourse.'" Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 828-29 (1989) (quoting Lears, *supra* note 283, at 569-70). Thus, simply stated, cultural hegemony means that the ideology, *i.e.*, the values and perceptions, of a dominant culture are set in such a way so that the masses, without realizing it, consent to accept, or agree with the dominant culture's ideology even if it is to the disadvantage of the masses. See FEMIA, *supra*, at 38-40 (discussing conformity in relation to concept of hegemony); see also Lears, *supra* note 283, at 569 (noting that, to Gramsci, ruling groups do not maintain power merely by giving their domination aura of moral authority through creation and perpetuation of legitimating symbols, but they also seek to win subordinate group's consent to existing social order).

of their own servitude.”<sup>285</sup> In other words, the concept of cultural hegemony recognizes that “less powerful folk may be unwitting accomplices in the maintenance of existing inequalities.”<sup>286</sup> This theory runs counter to much of the social and cultural historiography of the last few decades, which has stressed the subordinate cultures’ nearly inexhaustible resources for resistance to domination.<sup>287</sup> A review of Puerto Rico’s history illustrates how a subordinate group, the Puerto Rican people, have been accomplices in the maintenance of the colonial relationship; specifically, the Puerto Rican people, largely because of the efforts of their political leaders, “have been muddled by assimilation to the dominant culture . . . even to the point of believing and behaving against their own best interests.”<sup>288</sup>

While cultural hegemony depicts itself through a variety of mediums, including popular culture and the media, this Article focuses on how politics and economics in Puerto Rico helped contribute to an unwitting complicity to colonial subjugation. The Puerto Rican people’s “acceptance” of their colonial status stems from their adoption of the colonizer’s legitimating symbols and the acceptance of certain core elements of the dominant society. The manifestations of these theories in Puerto Rico are evident from the history of the Puerto Rican people, the perceived political and economic benefits of association with the United States and the influence of a consequential Puerto Rican political leader on the status issue. The United States’s failure to acknowledge the colonial nature of the relationship has also invariably contributed to the Puerto Rican people’s acceptance of U.S. imperialism.

### 1. *The Puerto Rican People’s History of Subordination*

A component of the Puerto Rican people’s consent relates to their history of subordination. The people of Puerto Rico, in terms of world history, are a young people, deriving largely from an amalgam of the Spanish, African and indigenous Arowak Indians.<sup>289</sup>

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285. See FEMIA, *supra* note 284, at 31 (discussing hegemony and Marxist definition of power).

286. See Lears, *supra* note 283, at 573 (commenting on criticism and hostility directed toward Gramsci’s work).

287. See *id.* (noting social historians have stressed autonomy and vitality of subordinate cultures).

288. See *id.* (comparing historians’ evaluations of world’s elite leaders to that of “the people”).

289. See CARR, *supra* note 117, at 1 (giving short history of Puerto Rico and its inhabitants). In 1897, as a result of Spain’s Charter of Autonomy to Cuba, the Spanish colony of Puerto Rico was also granted a form of autonomy. See *id.* After

The Puerto Rican people came into being after Spain's conquest in 1492. The very genesis of the people was, thus, a consequence of imperialism. They went from Spanish subjugation prior to 1898 to American subjugation after the Spanish-American War. Their history of being ruled throughout their existence has fostered an acceptance of foreign rule. For example, from the very inception of the United States-Puerto Rico relationship, the Puerto Rican people welcomed their invaders, as opposed to the Cubans and the Filipinos who demanded independence and were not accepting of U.S. rule.<sup>290</sup> Although more accepting of the Americans, the Puerto Rican people have not completely consented to colonialism. This resistance is evidenced by the armed opposition to it, such as "El Grito de Lares," during which the peasantry took arms against the Spanish empire, and the fairly isolated, but well-publicized armed conflicts against the U.S. government from the 1950s to the 1980s.<sup>291</sup> Nonetheless, the opposition to colonialism in Puerto Rico arose within the framework of the democratic values established by the United States. For example, from the 1940s to the 1990s, the Puerto Rican people, through their political leaders, have believed in the U.S. democratic process and, instead of militant opposition, have requested that Congress allow the people to change Puerto Rico's colonial status.<sup>292</sup> In sum, the Puerto Rican people's historical consent to U.S. dominance is a contributing factor to their con-

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the United States defeated Spain in the Spanish-American War, Spain, nevertheless, ceded Puerto Rico to the United States in the Treaty of Paris of 1898 as compensation for the War's expenses. *See id.* It was not until 1952 that the Commonwealth of Puerto Rico was formally established. *See id.*

Prior to receiving autonomy in 1897, Puerto Rico was a Spanish colony. *See id.* Puerto Rico was a poor island comprised of farmers and sugar, tobacco and coffee planters. *See id.* Puerto Rico served as a Spanish outpost, guarding the Caribbean. *See id.* Puerto Rico's autonomy ended as quickly as it began, when the United States acquired Puerto Rico in 1898. *See id.*

290. *See* CABRANES, *supra* note 89, at 32 (noting Puerto Rico's adherence to United States during Spanish-American War and contrasting Puerto Rico's acceptance of U.S. rule with that of other countries).

291. *See* FERNANDEZ, *supra* note 112, at 31 (noting that El Grito de Lares warned Spaniards living in Puerto Rico that they had three days to declare themselves in favor of the Republic, leave for Spain or accept the punishment reserved for traitors); Napoli, *supra* note 82, at 152-55 (discussing armed struggles against colonialism led in 1930s by Pedro Albizo Campos; 1950 attack on Blair House, President's residence; 1954 attack in U.S. House of Representatives; and 1980s Armed Forces for National Liberation (FALN) and Macheteros attacks on U.S. military installations).

292. For a further discussion of Puerto Rico's resistance to commonwealth status and quest for change from colonial status, see *supra* notes 196-224 and accompanying text.

tinuing subordination, but it is just one of several related factors that has played a role in the people's arguable acceptance.

## 2. *Perceived Benefits of Association with the United States*

Notwithstanding nearly one hundred years of colonialism, the vast majority of Puerto Rican people support some sort of association with the United States. Much of this support stems from the belief that there are economic and political benefits derived from association with the United States that outweigh the harm of sacrificing such amorphous and indefinite rights as autonomy and self-determination. In fact, the United States—unlike European colonizers such as England and France who stripped Africa and Asia of valuable natural resources—is largely considered a magnanimous colonizer who, for political and other reasons, attempted to foster Puerto Rico's economic expansion.<sup>293</sup>

Whether to support the United States's efforts has been at the center of politics in Puerto Rico. Though the territory has three main political parties, the two strongest—which over the last few decades have accounted for well over ninety percent of the electorate—favor an association with the United States, largely because of this belief in the benefits of the association. The PDP favors an enhanced commonwealth status.<sup>294</sup> This party, often through the efforts of political icon Luiz Muñoz Marin, controlled not only the government but the very tenor of the status debate in Puerto Rico for several decades after the establishment of commonwealth status.<sup>295</sup> PDP supporters have long argued that this status ensures cultural identity while at the same time promoting economic stability without the obligation of federal taxes that faces citizens of the individual states.<sup>296</sup> PDP supporters, by advocating for the preservation of commonwealth status, essentially used those perceived bene-

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293. Compare EDWARD W. SAID, *ORIENTALISM* 25 (1994) (discussing European colonization of Africa and Asia that culminated in World War II), with DIETZ, *supra* note 3, at 231 (commenting on United States's attempts to foster Puerto Rico's political and economic spheres).

294. See CARR, *supra* note 117, at 108 (noting that PDP favors enlarging autonomy that Puerto Rico presently enjoys).

295. See DIETZ, *supra* note 3, at 234 (discussing Luis Muñoz Marin's desire for new form of political status).

296. See CARR, *supra* note 117, at 144 (discussing costs and benefits of commonwealth status versus statehood); see also DIETZ, *supra* note 3, at 234 (discussing reform to current political status involving as retention of some aspects of commonwealth status and integration of aspects of statehood as well).



fits to Puerto Rico's economy to actually institutionalize the colonial relationship.<sup>297</sup>

Supporters of the second major political party, the NPP, which favors statehood, have also accepted the values of the dominant culture to such an extent that they wish to make Puerto Rico a state.<sup>298</sup> These supporters recognize the colonial nature of the commonwealth status, but instead of criticizing the United States, they argue for complete incorporation into the United States. They note that considerable economic advantages, in addition to increased representation in the U.S. government and increased rights of first-class U.S. citizenship status, would flow from becoming a state.<sup>299</sup> These advantages include (1) full eligibility for federal aid programs such as Food Stamp, Medicaid and Aid to Families with Dependent Children (AFDC) and (2) eligibility for Supplemental Security Income.<sup>300</sup>

There is considerable support for the NPP claims of economic advantages under statehood. For example, the Congressional Budget Office reviewed the economic impact of statehood and estimated that payments from the United States to the state of Puerto Rico under these programs would amount to three billion dollars a year in fiscal year 1995.<sup>301</sup> During the consideration of the 1993 plebiscite, the Congressional Research Service similarly analyzed the effect on selected federal social welfare programs under each status option.<sup>302</sup> The report noted several significant economic benefits under statehood including (1) replacement of the capital and Medicaid funds currently used with a more generous federal

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297. See DIETZ, *supra* note 3, at 234 ("Muñoz spoke of a new type of relation with the United States, neither as a forty-ninth state nor as an independent country, but a relationship that would provide the benefits of statehood without the obligation of paying federal taxes.").

298. Among the NPP's potential arguments is that it is not accurate for the PDP to claim that their status ensures cultural identity. As previously addressed, Congress's power over Puerto Rico is plenary, and thus, Congress can consequently affect Puerto Rico's culture by, among other things, passing English-only laws.

299. See *Economic and Fiscal Impacts of Puerto Rican Statehood*, reprinted in 2 PUERTO RICO: POLITICAL STATUS REFERENDUM 134-35 (1992) (comparing Puerto Rico's per capita income to that of individual states in United States).

300. See *id.* at 375-79 (estimating potential effect of statehood on U.S. outlays).

301. See *id.* at 380 (estimating federal outlays in 1995 fiscal year to Puerto Rico under statehood excluding effect on Puerto Rican economy).

302. See 137 CONG. REC. S2073, S2078 (1991) (statement of Rep. Moynihan) (analyzing possible effects on selected federal welfare programs of each status option and how federal tax relationship with Puerto Rico would change under status option).

matching formula, which would more than double medical spending in Puerto Rico; (2) substitution of the nutrition assistance block grant with the Food Stamp program, which could expand the territory's case-load by one-third or more; (3) replacement of the program of aid to the aged, blind or disabled with the Supplemental Security Income program, which would significantly expand the eligibility of the population in Puerto Rico as much as ten-fold; and (4) extension of the earned income tax credit, which could cover up to sixty-five percent of all families with children in Puerto Rico.<sup>303</sup> These economic-based arguments, as well as the United States's failure to resolve the status debate, has engendered greater popular support in Puerto Rico for statehood.

The statehood supporters, which in the most recent plebiscite gained nearly fifty percent of the electorate, fail, however, to recognize or at least accept the United States's historical reluctance to fully accept the Puerto Rican people.<sup>304</sup> As noted above, for nearly a century after repeated requests by the Puerto Rican people for autonomy or incorporation, the United States has refused to change Puerto Rico's colonial status. Moreover, with the recent federal budget deficit concerns, Congress will likely be even more reluctant to change its previous position and incur the federal budget drain of Puerto Rico as the fifty-first state. In fact, when considering Puerto Rico's status, Congress has recently requested that the status question somehow be resolved by revenue neutral means.<sup>305</sup> Thus, although the economic benefits stemming from statehood appear to be real, the statehood supporters in a form of half-consciousness have repeatedly asked the United States to accept Puerto Rico as a state, but have failed to admit that the United States for nearly a century has yet to demonstrate its willingness to make such an acceptance.

The third major political party, the Puerto Rican Independence Party (PIP), which has not garnered more than ten percent of the electorate in any of the recent referenda or gubernatorial elections, rejects the dominant culture and supports independence. For this party, the perception of economic progress under an asso-

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303. See *id.* (commenting on advantageous impact of statehood status on federal welfare programs in Puerto Rico and concluding such status would have "immediate social welfare benefits").

304. For a further discussion of the 1993 plebiscite and the United States's failure to recognize the results, see *supra* notes 207-24 and accompanying text.

305. See *Statehood for Puerto Rico: The Effect on Social Welfare Programs*, reprinted in 2 PUERTO RICO: POLITICAL STATUS REFERENDUM, *supra* note 299, at 233 (describing Senate Bill 712 as seeking to make all three status options neutral with respect to net effect on U.S. budget deficit).

ciation with the United States is a fiction that reaches only a minute section of the population, and, in actuality, only assists American corporations.<sup>306</sup> This party denounces U.S. colonialism and uses nationalistic pride as well as the Puerto Rican people's Spanish culture to argue against integration with the United States.<sup>307</sup>

In sum, the two leading political parties in Puerto Rico, which have historically represented upwards of ninety percent of the electorate, have accepted the perceived benefits of association with the United States and, therefore, have refused to reject the United States despite the century-long colonial relationship. Notwithstanding the United States's clear and repeated expression of its disinterest in changing Puerto Rico's colonial ways, for the vast majority of the Puerto Rican people the value of the actual and potential benefits of association with the world's greatest economic and military power simply outweighs autonomy, particularly when considering the economic plight of neighboring states such as the Dominican Republic, Cuba and Haiti.

### 3. *The Misguided Trust in the Colonizer*

As alluded to in this Article, the Puerto Rican people's support of commonwealth status is in large part a consequence of a Puerto Rican leader's belief that Puerto Rico would prosper economically under such a status and one day attain a novel form of auton-

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306. See generally *Puerto Rico: Information for Status Deliberation*, reprinted in 3 PUERTO RICO: POLITICAL STATUS REFERENDUM, *supra* note 170, at 147 (discussing Puerto Rican Independence Party's (PIP) views of economic progress and stating party's belief that "complete autonomy is required to correct the heart of Puerto Rico's very serious social and economic problems").

307. See CARR, *supra* note 117, at 297 (noting dominance of Spanish language is one example of Puerto Rican culture). The colonial relationship, the resulting political quandary concerning the territory's status and the importance of cultural identity have also added to the division on the status issue. As one writer notes, "politicization has made the cultural identity of Puerto Rico part of the pathology of island politics. Like everything else, it ultimately depends on the unresolved status issue. . . ." *Id.* Thus, the colonial predicament has even affected the Puerto Rican peoples' consciousness and identity. Proponents of statehood believe Puerto Rico's Spanish culture will continue to exist in a multicultural union. See *id.* (finding that those in favor of statehood do not perceive cultural barrier to assimilation). But commonwealth supporters threaten that Puerto Ricans will be stripped of their culture under statehood, and have used nationalistic advertising campaigns addressing areas such as olympic participation to engender support. See *id.* (stating commonwealth accommodates coexistence of cultures). The independentistas use the people's pride in their Spanish culture to demand separation. See *id.* ("To the PIP cultural identity is a foundation of its claim for separation; it erects a Berlin Wall, separating two civilizations.").

omy.<sup>308</sup> Puerto Rico's most prominent historical figure, Luis Muñoz Marin, was instrumental in shaping Puerto Rican political thought and convincing the people of Puerto Rico to accept the United States's commonwealth regime. Arguing that the people of Puerto Rico could have "the best of both worlds" under the rubric of an enhanced commonwealth association with the United States, Muñoz Marin, considered the founder of the country, was the great proponent of the commonwealth status.<sup>309</sup> As the first popularly elected Governor, Muñoz Marin acquired an unprecedented following in Puerto Rico. As will be addressed more fully, his political triumphs stemmed from his successful efforts at creating industrial expansion and economic growth during the 1950s and 1960s. In fact, until 1968 his power in Puerto Rico was considered almost absolute, and his popularity virtually ensured that the commonwealth status option would prevail in the 1951 and 1967 status referenda.<sup>310</sup>

In the early 1940s, Muñoz Marin became the founder of the procommonwealth party.<sup>311</sup> He believed that the United States-Puerto Rico commonwealth relationship could evolve to a "new kind of state . . . equal but different from statehood . . . sovereignty within sovereignty."<sup>312</sup> Muñoz Marin worked relentlessly toward developing this compact between the two countries and believed that by establishing an enhanced commonwealth status Puerto Rico could rid itself of all colonial trappings; furthermore, such a status

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308. See DIETZ, *supra* note 3, at 234 (discussing Muñoz Marin's alternative form of commonwealth status "that would provide the benefits of statehood without the obligation of paying federal taxes").

309. See CARR, *supra* note 117, at 90 (noting Muñoz Marin believed enhanced commonwealth status would ensure the maintenance of culture and sense of autonomy coupled with economic and military protection of United States); see also FERNANDEZ, *supra* note 112, at 178-79 (stating Muñoz Marin claimed status would result in greater self-governance). "I am going to ask the people of the United States, if the Puerto Ricans allow us to do it with their votes, to establish this high precedent to finish in the world the liquidation of the colonial system." *Id.* (quoting Muñoz Marin).

310. See CARR, *supra* note 117, at 73 (stating that Muñoz Marin's political history as president of Puerto Rico's Senate, first elected governor and undisputed leader of PDP with overwhelming majority in both legislative houses guaranteed his political power).

311. See *id.* at 114-15 (stating that Muñoz Marin left Liberal party because of party's acceptance of "suicidal" independence offered by Tydings bill and formed his own procommonwealth party). Once an independentista, Muñoz Marin presented the commonwealth status as "a new road to old objectives." *Id.* at 118. Many independentistas, however, "saw it as leaving the old road altogether." *Id.* (finding that Muñoz Marin's rejection of independence resulted in desertions as "die-hard independentistas" left to join PIP).

312. See *id.* at 81 (discussing results of United States-Puerto Rico commonwealth relationship as form of sovereignty).

would provide the island with the right to prevent Congress from passing laws affecting it without its consent.<sup>313</sup>

Muñoz Marin, however, never attained the definitive promises for enhancement from U.S. officials that he so desperately wanted.<sup>314</sup> He retired in 1964, defeated in his quest for an enhanced status, but still believing that it could nevertheless be achieved.<sup>315</sup> Despite Muñoz Marin's repeated failures in attaining an enhanced status, the PDP continues to advocate for a Muñoz Marin-type enhanced status.<sup>316</sup> The PDP's idealistic, but unrealistic, tactic has engendered support from a majority of the Puerto Rican electorate.<sup>317</sup> Thus, in the face of the United States's "refusal," the lifelong belief and efforts by Muñoz Marin to create an "enhanced commonwealth" that would provide autonomy and economic stability significantly contributed to the Puerto Rican people's unwitting complicity with the United States's colonial rule.

#### 4. *The United States's Symbolism*

The acceptance of the United States by the Puerto Rican people is not solely the fault of the Puerto Rican people's half-conscious complicity in their own victimization.<sup>318</sup> The United States, as the dominant colonial culture and through the establishment of the commonwealth status, has fostered a political identity crisis in Puerto Rico. During the 1940s, in response to the Puerto Rican

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313. See *id.* at 82-83 (stating Muñoz Marin devoted his political career to riding "compact" of all ambiguities and expanding Puerto Rico's control over its own destiny). Muñoz Marin declared "the idea of 'compact' determines a basic change in the relationship. It takes away from the very basis of the relationship the nature and onus of colonialism. It cannot be revoked or changed unilaterally.'" GORDON K. LEWIS, *PUERTO RICO: FREEDOM AND POWER IN THE CARIBBEAN* 413 (1963) (quoting Muñoz Marin).

314. See FERNANDEZ, *supra* note 112, at 208 (noting Muñoz Marin's humiliation at hands of President Kennedy and Congress "moved many to question his abilities" and led to his retirement).

315. See *id.* (enumerating reasons for Muñoz Marin's retirement, such as misreading President and Congress and strong party opposition).

316. See *id.* at 210 ("Before and after Muñoz, the Populares agreed, however reluctantly, that all roads led to Washington. No matter how many times Congress refused to enhance Commonwealth, the Populares refused to opt for any other significant alternative."). It is precisely the PDP's efforts to attain such a status through the 1993 plebiscite that led to Congress's ultimate rejection of the plebiscite. For a further discussion of Congress's rejection of the 1993 plebiscite, see *supra* notes 207-24 and accompanying text.

317. For a further discussion of the unrealistic desires of the previously most popular Puerto Rican political party hoping for enhanced commonwealth status demonstrated in the 1993 plebiscite, see *supra* notes 207-24 and accompanying text.

318. See Lears, *supra* note 283, at 573 (theorizing on impact of hegemonic universe on interests of some groups).

people's demands and the international community's criticisms, the United States, under the auspices of a compact between itself and Puerto Rico, created the commonwealth status.<sup>319</sup> Despite the fact that all parties involved in the process realized that the nature of the relationship had not changed, the United States used the term "compact" and the new commonwealth status to claim to both the U.N. and the Puerto Rican people that Puerto Rico was now self-governing. In addition, the United States did little when Muñoz Marin and his fellow commonwealth supporters argued that the commonwealth status created some sort of binding agreement between states that was unalterable without mutual consent.<sup>320</sup>

In part from the confusion created by the establishment of the commonwealth through a "compact," and in part from wishful thinking of some Puerto Rican political leaders, the United States until recently has allowed the commonwealth supporters to use an unrealistic status option to maintain popular support in Puerto Rico. This permissive action flew in the face of United States judicial and legislative acts on the issue.<sup>321</sup>

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319. For a further discussion of the "compact" between the United States and Puerto Rico creating a commonwealth status, see *supra* notes 149-66, and accompanying text.

320. See CARR, *supra* note 117, at 80-83 (attempting to resolve issue of autonomy in Puerto Rico). Even to this day, the commonwealth status supporters argue that the creation of the commonwealth created some form of autonomy. See H.R. REP. NO. 104-713, pt. 1, at 20 (1996) ("Congress in 1950 which authorized adoption of the local constitution approved in 1952, created an 'unalterable bilateral pact' which precludes Congress from making any changes in the state of Federal law applicable to the 'Commonwealth' without the consent of Puerto Rico."). It is this very argument which led Congress to reject that party's idealistic definition of the status in the 1993 plebiscite. The commonwealth supporters had defined the "commonwealth" to be a composite of a state and an independent nation. See *id.* at 16 (explaining that definition of "commonwealth" included elements of independence and statehood that made results of 1993 vote difficult to interpret). The statehood elements guaranteed permanent union with the United States and irrevocable U.S. citizenship. See *id.* (adding that those were elements attainable only through statehood). The independent nation elements included exemptions from federal taxation, and veto power over federal laws applicable to Puerto Rico. See *id.* (noting independent nation elements amounted to "treaty based government-to-government relationship").

321. For example, directly at odds with the commonwealth supporters view of citizenship, the U.S. Supreme Court confirmed Congress's plenary authority over Puerto Rico, holding that under its authority Congress could treat Puerto Rico differently from the states of the union. See *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980). Further, the Court suggested that Congress has the ability to alter or even revoke citizenship for those who are not "born or naturalized" in the United States. *Rogers v. Bellei*, 401 U.S. 815, 831 (1971). As previously addressed, the U.S. citizenship of the people of Puerto Rico is statutory under the Jones Act of 1917 and, according to *Rogers*, could be altered or even revoked by Congress. See Act of March 2, 1917, ch. 145, § 5, 39 Stat. 951, 953 (1917) (declaring Puerto Ricans are U.S. citizens unless they declare otherwise).

### 5. *A Question of Complete Consent*

One commentator acknowledged that "ruling groups never engineer consent with complete success."<sup>322</sup> While in some respects the concept of cultural hegemony appears to apply to Puerto Rico and the people as a whole have not taken up arms against their colonizers, the Puerto Rican people have not completely accepted colonialism. Although they have largely worked within the colonial framework established by the United States, the Puerto Rican people, when given the option to choose their status, have never favored colonialism, but have always supported increased autonomy. In the 1951 referendum, the Puerto Rican people favored greater local autonomy under the commonwealth status, as it was the only choice other than naked colonialism. In the 1967 referendum, the Puerto Rican people by a vote of sixty percent favored an "*enhanced* commonwealth status."<sup>323</sup> The 1993 referendum results were forty-nine percent for an "*enhanced* commonwealth status" and forty-six percent for statehood.<sup>324</sup> Thus, the Puerto Rican people do not support the endless perpetuation of the non-self-governing commonwealth status as is currently presented in Puerto Rico.<sup>325</sup>

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In addition to judicial pronouncements, executive and legislative acts have confirmed Congress's power over Puerto Rico. When the commonwealth supporters were in power in the late 1980s and attempted to negotiate tax-sparing treaties with foreign governments, the U.S. Department of State thwarted such efforts. See H.R. REP. NO. 104-713, pt. 1, at 20 (noting leaders of commonwealth party insist to this day that Puerto Rico will one day conduct treaty relations in its own name). Further, after initiating Puerto Rico's industrial revolution largely through the use of a tax incentive system under I.R.C. section 936, Congress recently unilaterally phased out this backbone of Puerto Rico's economy. See H.R. REP. NO. 104-586, at 205-06 (1996) (stating continuation of tax credit is "no longer appropriate").

322. Lears, *supra* note 283, at 570 (discussing Gramsci's theory of cultural hegemony and role of consent within theory).

323. See *Elections in Puerto Rico Home Page* (visited Oct. 5, 1997) <<http://www1.pitt.edu/~alvarez/eleccion.es.pr/archivo/1967.html>> (reporting election results of 1993 plebiscite by county).

324. See 140 CONG. REC. S71 (daily ed. Jan. 25, 1994) (statement of Sen. Simon) (attaching article written by former Puerto Rico Governor Carlos Romero-Barcelo in which Governor states Commonwealth received 48.6% of vote, statehood 43.6% and independence 4.4%); see also *Elections in Puerto Rico Home Page* (visited Oct. 5, 1997) <<http://www1.pitt.edu/~alvarez/eleccion.es.pr/993/resumen.html>> (reporting election results of 1993 plebiscite by county).

325. See *Plebiscite Joint Hearing*, *supra* note 17, at 56 (statements of Hon. Ruben Berrios-Martinez) (noting that Berrios-Martinez was President of Puerto Rican Independence Party and ranking Senator of Puerto Rican Legislature). When questioned about the 1993 plebiscite, Mr. Berrios-Martinez stated that he believed the results to show that a majority of Puerto Ricans want independence and that the Puerto Rican people should be allowed to choose between commonwealth status and independence. See *id.* (stating that by "commonwealth," Berrios-Martinez meant an independent land with bilateral pact with United States). When a congressman asked if he meant a commonwealth with independence, Mr. Berrios-Mar-

B. *Economic Dependence Resulting from Economic Development in the Colonial Regime*

While congressional and Supreme Court euphemisms designed to avoid the colonizer label had a consequential impact on Puerto Rico's future, the economic development programs geared to assist Puerto Rico also ensured the entrenchment of the colonial relationship. According to Gramsci theorists, the consequential reason for the masses' acceptance of the dominant culture stems from "the prestige . . . which the dominant group enjoys because of its position and function in the world of production."<sup>326</sup> As a world economic power, the United States was not only perceived to potentially provide substantial economic support, but in fact established such support through tax-based industrialization incentive economic programs.<sup>327</sup> This Part of the Article addresses the colonial conundrum that has arisen from the U.S.-based economic development efforts. Specifically, in an effort to assist Puerto Rico's economy, Puerto Rico and the United States established an industrial development program based on U.S. federal income tax exemptions that created a legitimizing symbol which supported colonialism.<sup>328</sup> If Puerto Rico became a state, the federal tax loophole, which was not available to any of the fifty states because of legal and political reasons, would likely be discontinued. With independence there would be no tax loophole because the U.S. incentive for one would simply not exist.<sup>329</sup> The Puerto Rican people were thus left with the choice of potential economic prosperity under colonialism or self-determination in the face of economic

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tinez replied: "A commonwealth with sovereignty and noncolonial, nonterritorial sovereignty. That is what the people voted for. That is not what Puerto Rico has now." *Id.*

326. Lears, *supra* note 283, at 568 (quoting GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quentin Hoare & Geoffrey Nowell Smith eds., 1971) (defining cultural hegemony)).

327. See CARR, *supra* note 117, at 201-04 (discussing original impression that U.S. economic power could provide Puerto Rican "escape" from poverty). Economics has been so inextricably intertwined with the status question that "most Puerto Ricans view the legitimacy and desirability of Commonwealth . . . as deriving . . . from the indisputable economic benefits" resulting from association with the United States. *Id.*

328. See *id.* at 203-04 (describing appeal of Operation Bootstrap and tax exemption policies on Puerto Rican and American investors); DIETZ, *supra* note 3, at 206-12 (discussing Operation Bootstrap and goal of tax incentives to make Puerto Rico "irresistable" for investors).

329. See generally Deutch, *supra* note 89, at 685 (discussing whether tax loophole would be unconstitutional under Uniformity Clause if Puerto Rico became state). For a further discussion of this issue, see *infra* notes 347-78 and accompanying text.



plight. Naturally, this predicament created a strong incentive for maintenance of the status quo which resulted in the consent of the Puerto Rican people and a unique form of economic exploitation.

The United States's involvement in Puerto Rico's economic development gained momentum shortly after the acquisition of the territory.<sup>330</sup> Not long after becoming an imperial power, the United States's economic power was threatened by its own economic strife. In the beginning of the 1930s, the United States faced the Great Depression, which threatened its own economic viability and that of its politically and economically dependent territories such as Puerto Rico.<sup>331</sup> During this period, the economic conditions in Puerto Rico—including unemployment rates, the standard of living and real wages of workers—took a downward spiral without any sense of near-term recovery.<sup>332</sup> This led to instability in the territory that was fueled by the nationalist party which called for Puerto Rican independence.<sup>333</sup>

In response, in the early 1930s, President Hoover undertook the first efforts to revive Puerto Rico's economy, including development of the Reconstruction Finance Corporation, which extended credit for public works projects.<sup>334</sup> President Roosevelt followed this effort with programs such as the Federal Emergency Relief Administration, which also provided grants for public works projects.<sup>335</sup> Unfortunately, these programs fell short of revitalizing Puerto Rico's economy.<sup>336</sup>

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330. See generally CARR, *supra* note 117, at 203-05 (describing state of Puerto Rican economy before and during initial stages of U.S. involvement).

331. See DIETZ, *supra* note 3, at 135 (stating ability of all Western capitalist nations to prevent social instability and political collapse was in danger because of Great Depression).

332. See *id.* ("Puerto Rico experienced the dislocations of the depression years in all their manifestations. There was a breakdown in the functioning of the predominantly monocultural, agricultural model of growth, which led to open and at times violent class struggle and demands for change.").

333. See *id.* (describing Nationalist Party as "visible and militant force and a danger to U.S. interests in Puerto Rico with its demand for unconditional and immediate independence").

334. See *id.* at 146 (describing Hoover's economic aid package to Puerto Rico involving spending one million dollars on irrigation and creating 3.5 million hours of work for 1200 workers).

335. See *id.* (noting major interventions in Puerto Rican economy initiated by Franklin D. Roosevelt including program in which federal government would spend one dollar for every three dollars spent by local government).

336. See *id.* at 146-47 (describing Puerto Rican Emergency Relief Administration (PRERA) and its effects). Although PRERA did bring aid to some Puerto Ricans, it lasted only a short time because of inadequate funding. See *id.* at 147 ("[N]othing the PRERA could do with its meager resources was enough to blunt the harshness of the depression conditions.").

Under the auspices of the New Deal, the United States and Puerto Rico implemented a wide variety of programs to revitalize Puerto Rico's economy. The New Deal programs ranged from state-run industry to agrarian reform, but unfortunately, they too failed to revitalize the economy.<sup>337</sup>

### 1. *Operation Bootstrap*

In the 1940s, a shift evolved in the direction of economic development in Puerto Rico. The new economic policy focused on developing means to attract private capital. Muñoz Marin gained tremendous popularity by focusing on Puerto Rico's economic plight and sought to transform the agricultural economy to an industrial one.<sup>338</sup> In 1947, under the strong support of Muñoz Marin and the endorsement of the United States, the Puerto Rican legislature initiated a development program that took advantage of a U.S. federal income tax loophole deriving from the Revenue Act of 1921<sup>339</sup> and related laws.<sup>340</sup> Section 262 of the Revenue Act provided that "United States citizens, or U.S. corporations that met the requirements of this section, qualified for a tax exclusion on their foreign and possession source income."<sup>341</sup> Essentially, this meant that the income of what was known as a "possessions corporation" in Puerto Rico was exempt from U.S. taxes.<sup>342</sup>

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337. Cf. *id.* at 149 (describing political climate in Puerto Rico during New Deal era). A coalition of the Socialist and Republican Union parties, hostile to Roosevelt and the New Deal, held a majority in the Puerto Rican legislature. See *id.* at 148-49 (adding governor supported New Deal but did not actively enforce it). Therefore, all New Deal programs had an "uphill battle" in an "unfriendly environment." *Id.*

338. See Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 1, 17 (1982) (discussing overall issues faced by Puerto Rico and United States in defining their relationship and Puerto Rico's commonwealth status). Puerto Rico experienced a surge of nationalism during the 1930s as a result of the poor economic conditions. See *id.* at 15-16 (noting economic troubles attributable to both Great Depression and two hurricanes which struck island). As a part of this nationalism, Luis Muñoz Marin founded the PDP, whose platform addressed economic issues. See *id.* (stating Muñoz Marin gained both popular support and political office).

339. Pub. L. No. 98, ch. 136, § 262, 42 Stat. 227, 271 (1921).

340. See DIETZ, *supra* note 3, at 209-10 (stating Puerto Rican legislature passed Industrial Incentives Act in 1947 to make efficient use of federal tax exemption); Olivo, *supra* note 96, at 50-51 (discussing the tax exclusion given to U.S. citizens or corporations that qualified under section 262).

341. See § 262, 42 Stat. at 271 (providing that "in the case of citizens of the United States or domestic corporations, satisfying the following conditions, gross income means only gross income from sources within the United States").

342. See Olivo, *supra* note 96, at 51 (noting "income of the possessions corporation from sources outside the United States is exempt from tax") (footnote omit-

The Puerto Rican legislature recognized that it could not attract private U.S. investors if those investors, notwithstanding the federal income tax loophole, still faced Puerto Rican taxes.<sup>343</sup> Consequently, the Puerto Rican legislature passed the Industrial Incentives Act,<sup>344</sup> which for a specified period provided a complete exemption from insular income taxes.<sup>345</sup> Hence, the genesis of "industrialization by invitation" or "Operation Bootstrap."<sup>346</sup>

The United States furthered Operation Bootstrap's goal of inviting U.S. private investment when it codified sections 260 and 262 of the Revenue Act as sections 251 and 252, respectively, of the Internal Revenue Code of 1939. The tax exemption section of the Code later became section 931 of the Internal Revenue Code of 1954.<sup>347</sup> "Under Section 931 of the Internal Revenue Code, subsidiaries of U.S. corporations were able to qualify as possessions corporations, and were permitted to exclude their Puerto Rican income

ted). See generally § 262, 42 Stat. at 271 (providing tax exemption). One commentator noted that

[s]ection 262 applied if two tests were satisfied by the taxpayer: a gross-income source test and a gross-active business test. The first test required that the taxpayer derive 80% or more of its gross income for the three-year period immediately preceding the close of the taxable year from sources within a possession of the United States. The second of the requirements, the gross-active business test, was satisfied if at least 50% of the gross income for such period or such part thereof, was derived from the active conduct of a trade or business within a possession of the United States.

Olivo, *supra* note 96, at 51 & n.170 (stating that "possessions corporation" is one that is formed under laws of U.S. state and meets 80-50 gross income test).

343. See DIETZ, *supra* note 3, at 209 (noting that U.S. corporations "thus gained very little tax advantage from the 931 legislation"); see also Olivo, *supra* note 96, at 51 (discussing Puerto Rican tax exemption program anticipated to attract new industries to Puerto Rico when applied in conjunction with federal tax exemption).

344. See Act of May 13, 1948, P.R. LAWS ANN. tit. 13, §§ 221-51 (1996) (noting that Act expired in part, was reclassified in part and one section was incorporated again by 1966 act).

345. See DIETZ, *supra* note 3, at 209-10 (discussing enactment of Industrial Incentives Act and its effects); Olivo, *supra* note 96, at 51 (stating Puerto Rican government began its own tax exemption program with goal of attracting new industries).

346. Cf. *Plebiscite Joint Hearing*, *supra* note 17, at 19 (statement of Rep. Gutierrez) ("Our country, born of a revolutionary war of independence does not take too well to the role of colonial ruler. Moreover, our constitutional form of government rejects anything colonial . . ."). Puerto Rico's tax advantage did not necessarily only derive from magnanimous United States efforts to strengthen Puerto Rico's economy, but also from United States fears of being labeled a hypocrite. Presumably, Congress could not bear the thought of a "San Juan Tea Party."

347. See Olivo, *supra* note 96, at 62 n.203; see also PANTOJAS-GARCIA, *supra* note 3, at 107 (1990) (noting that although sections 251 and 252 were in existence for decades, it was not until enactment of section 931 that subsidiaries of U.S. corporations started to take advantage of tax loophole).

from their U.S. corporate tax bill (unless their profits were repatriated or otherwise returned to the United States)."<sup>348</sup> The income exclusion provided by section 931 served as "one of the pillars on which the economic development program called 'Operation Bootstrap' was based."<sup>349</sup> In fact, the development of section 931's loophole is considered "one of the most, if not the most, significant factors in the industrialization of Puerto Rico."<sup>350</sup>

The tax plan under the auspices of Operation Bootstrap gave U.S. private corporations a legally tax-free means to earn income. In addition to avoiding U.S. corporate income taxes, qualifying corporations were exempt from Puerto Rican corporate income tax, income tax on dividends, municipal taxes, license fees and property taxes.<sup>351</sup> The goal of this program was to subsidize capital investment, thereby creating an influx of capital into Puerto Rico, which would theoretically result in increased employment rates and standards of living and substantial reinvestment in Puerto Rico.<sup>352</sup> The United States and Puerto Rico attempted to create a corporate panacea.

Unfortunately, although Operation Bootstrap became a boon for U.S. industry and the Puerto Rican economy obtained an era of considerable growth, Puerto Rico's economy became completely dependent on the United States and the Puerto Rican people did not reap as many of the intended economic rewards.<sup>353</sup> One of the

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348. DIETZ, *supra* note 3, at 209; see PANTOJAS-GARCIA, *supra* note 3, at 107 (discussing ability of corporations operating subsidiaries to request special status of possession corporations); see also Ann J. Davidson, *A Credit for All Reasons: The Ambivalent Role of Section 936*, 19 U. MIAMI INTER-AM. L. REV. 97, 109-12 (1987) (examining U.S. policies on Puerto Rico and specifically section 936 and concluding section 936 is necessary for Puerto Rico to compete with other countries with similar economies and United States must define its role in Puerto Rican economy before defining section 936's role).

349. Francisco Hernandez-Ruiz, *A Guide Across the Spectrum of Section 936*, 19 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 131, 132 (1984) (noting constant amendments to section 936 not only made law more complex but also prevented it from being consistently implemented long enough to achieve goals).

350. *Id.*

351. See DIETZ, *supra* note 3, at 300-01 (outlining various tax incentives provided by Operation Bootstrap).

352. See *id.* (describing Operation Bootstrap's goals and noting U.S. corporations could avoid paying all taxes if they did not repatriate profits to parent corporation).

353. See *id.* at 301 (noting that because U.S. companies held onto money they saved instead of reinvesting back into Puerto Rico, island did not gain benefits that were expected from reinvestment). As will be demonstrated below, the end result was an entrenched institutionalized system of corporate welfare, and virtually an entire economy dependent on an incentive-based system which gave United States industry a very strong reason to support Puerto Rico's colonial status.

unintended results of the incentive program was the domination of key Puerto Rican industries by private U.S. corporations.<sup>354</sup> This industrial revolution from Operation Bootstrap consequently made the Puerto Rican economy dependent on U.S. laws and U.S. private investment for promotion of growth and the maintenance of stability. While not self-defining, the notion of dependency often connotes negative economic consequences for the dependent economy. Economic dependency typically arises when a country has its "economy conditioned by the development and expansion of another economy, to which the former is subject."<sup>355</sup> Dependency has been associated with the notion of a "penetrated political system" in which "the role of foreigners is not limited to merely exerting exogenous influence."<sup>356</sup> Like the theory of hegemony, dependency theory postulates that foreigners actively participate in the economically dependent country's internal decision-making processes and that the dependent country's elite groups, as well as the general public at times, accept this involvement.<sup>357</sup> The notion

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354. See PANTOJAS-GARCIA, *supra* note 3, at 113-14 (noting that by early 1970s U.S. capital, including 110 of "Fortune 500" companies operating 336 subsidiaries, controlled production in six of ten most important Puerto Rican industries); *see also* Jose Cruz, *Puerto Rican Independence, Then and Now* (visited Sep. 27, 1996) <<http://www.hartford-hwp.com/cp-/archives/95-09-23-2.html>> (reporting 60% of all businesses in Puerto Rico are U.S. owned). In addition, "in 1973 foreign stockholders (mainly U.S.) controlled 98 percent or more of the shares of the establishments in the drug, chemical and petrochemical, fabricated, metal, and electrical and nonelectrical machinery industries." PANTOJAS-GARCIA, *supra* note 3, at 113. "[I]n 1974, of an estimated total of \$22 billion in tangible and reproducible assets on the island, only \$9.7 billion (44.1 percent) was in the hands of the residents of Puerto Rico." *Id.*

355. JAMES D. COCKCROFT ET AL., *DEPENDENCE AND UNDERDEVELOPMENT: LATIN AMERICA'S POLITICAL ECONOMY* 71 (1972) (citing THEOTONIO DOS SANTOS, *LA CRISIS DE LA TEORÍA DEL DESARROLLO Y LAS RELACIONES DE DEPENDENCIA EN AMÉRICA LATINA* 26-27 (1968)). The Latin American dependence on the economies of Europe and the United States is the legacy of colonialism and imperialism. *See id.* (attributing dependence to underdevelopment as result of colonialism and imperialism).

356. H. MICHAEL ERISMAN, *PURSuing POSTDEPENDENCY POLITICS: SOUTH-SOUTH RELATIONS IN THE CARIBBEAN* 38 (1992) (discussing "controlled dependence," intermediate state between complete dependence and balanced interdependence) (citing James N. Rosenau, *Pre-Theories and Theories of Foreign Policy*, in *APPROACHES TO COMPARATIVE AND INTERNATIONAL POLITICS* 27, 65 (R. Barry Farrell ed., 1966)).

357. *See id.* (discussing Rosenau's theories). There are substantial writings on the differences between the terms "dependency" and "dependence," which largely draw a distinction in the degree of the imbalance of power. *See generally* ERISMAN, *supra* note 356, at 35-38 ("[The] key difference between the two system states can be found in the perceived degree of susceptibility to foreign penetration and domination."). This Article treats the United States-Puerto Rico relationship as one of dependency, as there is in Puerto Rico a loss of fundamental decision making power to outsiders.

of a penetrated system accepts that the intervention may be confined to a specific area, such as economic affairs.<sup>358</sup>

The typical negative consequences of economic dependency include transfer of control to foreign hands, monopolistic control of key markets by foreign companies and a decrease of internal alternatives and opportunities. Puerto Rico has suffered from all of these negative consequences. The problem in Puerto Rico resulted from the practical U.S. monopoly created by the capital influx and dominance of U.S. interests on the territory's economy.<sup>359</sup> As one commentator noted, "we are witnessing here a classic example of how the economic laws that govern the relationships between superordinate and subordinate societies operate in such a way as to tighten the vise of economic dependency."<sup>360</sup> The tax incentive plan placed U.S. businesses in an advantageous bargaining position in their relations with Puerto Rico's police power.<sup>361</sup> In the absence of an alternative national economic planning program, and with its subsidy economy, the territory was "helpless to control the movements of a private economic power."<sup>362</sup> If private U.S. investment dried up, the Puerto Rican economy would be devastated, causing tremendous economic dislocation.<sup>363</sup> Therefore, the continuing success of Puerto Rico's incentive program, and consequently its economy, rested in large measure upon the persistence of the tax advantages.<sup>364</sup> A General Accounting Office report on the status question notes that "the after-tax rate of return to section 936 corporations located in Puerto Rico might fall below levels available on the mainland or in third-world countries. The drop in

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358. See ERISMAN, *supra* note 356, at 38 (noting in some instances interventions will be confined to "one issue-area" but in other instances will be "much more pervasive").

359. See LEWIS, *supra* note 313, at 190 (discussing problems of economic dependency in Puerto Rico and stating one of main problems of Puerto Rico's economic dependency is that too much capital comes from United States).

360. *Id.* at 197.

361. See *id.* at 193-94 (discussing prior examples of relations between U.S. businesses and state police power). American businesses can threaten to close down plants in Puerto Rico if laws or regulations that are disadvantageous to the businesses are enacted. See *id.* (stating Puerto Rican government must respect and consider bargaining power of American businesses because economy is dependent upon United States's involvement).

362. *Id.* at 195.

363. See CARR, *supra* note 117, at 74 (stating pattern was established and lasted to present day: "forced industrial development, promoted by government agencies[,] . . . lock[ed] the Puerto Rican economy into that of the American mainland").

364. See LEWIS, *supra* note 313, at 192 (noting tax advantages can persist either through periodic renewal or by becoming permanent part of public policy).

return could lead some firms to relocate their operations, while others might slow their investment in Puerto Rico' without leaving."<sup>365</sup> The report concludes that a loss of the tax incentive could lead to major political and economic change.<sup>366</sup>

Although developed to assist the Puerto Rican economy, the tax incentive program was also troubling as it turned out to be a plan of economic development for private U.S. corporations. The U.S. possession corporations developed practices that were beneficial for themselves but often harmful to Puerto Rico's economic growth.<sup>367</sup> Instead of reinvesting in Puerto Rico, U.S. corporations found other tax loopholes to repatriate their profits without paying taxes or investing in the territory.<sup>368</sup> For example, under section 931, dividends paid by a Puerto Rican subsidiary to a U.S. parent were taxable, but a qualifying corporation typically elected to accumulate its profits until the end of the tax exemption period and then liquidate its subsidiary company into the U.S. based parent corporation, sending all tax-free profits home to the United States.<sup>369</sup> Another practice, which often resulted in a failure to re-invest directly into the possession company's local economy, was the accumulation of liquid assets in the form of deposits in U.S. banks.<sup>370</sup> One author noted:

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365. *Congressional Budget Office Papers: Potential Economic Impacts of Changes in Puerto Rico's Status Under S.712* (1990), reprinted in 2 *PUERTO RICO: POLITICAL STATUS REFERENDUM*, *supra* note 299, at 24 (discussing possible economic consequences that statehood status would have on Puerto Rico especially if achieving statehood meant losing tax exemption policy).

366. *See id.* at 44 (concluding economic changes would occur between Puerto Rico and mainland as well as Puerto Rico and U.S. firms which would benefit from section 936).

367. *See* PANTOJAS-GARCIA, *supra* note 3, at 117 (discussing role of transnational capital in Operation Bootstrap). Two such practices include stockpiling liquid assets in U.S. banks instead of directly reinvesting in Puerto Rico and liquidating Puerto Rican subsidiaries just before the tax exemption period ended so that no federal income taxes were owed. *See id.* ("[I]n many instances these liquidations were nothing but a paper transaction in which one subsidiary sold its tangible assets to another subsidiary of the same parent corporation.").

368. *See* DIETZ, *supra* note 3, at 301 (discussing tax exemption granted to qualifying corporations in Puerto Rico); *cf.* PANTOJAS-GARCIA, *supra* note 3, at 116 (describing economic conditions resulting from tax exemptions).

369. *See* PANTOJAS-GARCIA, *supra* note 3, at 117 (discussing ways that U.S. corporation avoided reinvesting in Puerto Rico). "Such liquidation and profit remittance was permitted under section 332 of the U.S. Internal Revenue Code and section 4 of the 1963 Puerto Rico Industrial Incentive Act." DIETZ, *supra* note 3, at 301 n.140; *see also* *Puerto Rico: Information for Status Deliberation*, reprinted in 3 *PUERTO RICO: POLITICAL STATUS REFERENDUM*, *supra* note 170, at 150 (discussing how Puerto Rico's self-determination of its status could affect economic development).

370. *See* PANTOJAS-GARCIA, *supra* note 3, at 117 (stating liquid assets were either deposited into banks or into financial assets that yielded high interests); *see*

People out to make a killing had little interest in Puerto Rico's long-term development.

...

Profits exploded in Puerto Rico. The terrible irony was that a 1921 law passed to give Americans a better chance against native and foreign competition would now be used to give Americans decided advantages over the locals, who, theoretically, were creating a self-sustaining economy.<sup>371</sup>

In the eyes of corporate America, Puerto Rico was perfect from a tax perspective. The qualifying corporations made billions of dollars in tax-free income.<sup>372</sup> In the eyes of both the United States's and Puerto Rico's governments, there arose a tremendous need to change the loophole to effectuate its purpose of assisting Puerto Rico's economy. This need for reform arose not only to revitalize Puerto Rico's economy, but also to prevent qualifying corporations from abusing the process by circumventing the efforts to promote reinvestment in Puerto Rico.

In 1973 and 1974 the House Ways and Means Committee discussed the repeal of section 931 during hearings on tax reform.<sup>373</sup> "The Puerto Rican government convinced Congress not to disturb the existing relationship between the possession investment incentives and the U.S. tax laws."<sup>374</sup> Congress recognized that it would be difficult to attract U.S.-based investment if it repealed the tax incentive.<sup>375</sup> Instead, Congress enacted section 936 of the Internal Revenue Code, which effectively repealed section 931 but only

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also DIETZ, *supra* note 3, at 301 (stating U.S. corporations would rather hold their money in unproductive bonds than reinvest it into Puerto Rico).

371. FERNANDEZ, *supra* note 112, at 169-70 (stating Puerto Rican leaders at time of Operation Bootstrap did not oppose tax exemption program because they feared that American industry would pull out of Puerto Rico).

372. *See id.* (discussing tax exemption for U.S. corporations in Puerto Rico). By liquidating a corporation at the end of the exemption period, the corporation achieved complete tax exemption without reinvesting any money back into Puerto Rico. *See id.* (noting American law allowed any property that was liquidated to remain tax free). If the Internal Revenue Service ("IRS") tried to prove that the corporation was liquidated only to avoid taxes, it would have to destroy all attempts by the corporation to comply with the IRS tax laws. *See id.* at 170 ("[L]iquidations were, after all, legal.").

373. *See* Davidson, *supra* note 348, at 115 (discussing enactment of section 936). Specifically, the committee considered "the repeal of the tax-free liquidation rules for possessions corporations and retention of the deferral rules on undistributed earnings of foreign subsidiaries." *Id.*

374. *Id.* at 116.

375. *See id.* ("[C]ertain requirements upon the possessions . . . made it difficult for Puerto Rico to attract U.S. corporations.").



modified the tax incentives.<sup>376</sup> This new section permitted "U.S. subsidiaries operating in Puerto Rico . . . to remit their profits to parent corporations at any time without paying federal corporate income tax."<sup>377</sup> The goal of section 936 was to induce the qualifying corporations to invest their excess earnings in Puerto Rico or other U.S. possessions.<sup>378</sup>

## 2. *The Economic Results of Sections 931 and 936*

Initially, Operation Bootstrap resulted in the substantial and rapid expansion of Puerto Rico's economy.<sup>379</sup> Puerto Rico, formerly known as the "poorhouse of the Caribbean," was now called the "showcase of Democracy."<sup>380</sup> The growth was particularly dramatic from 1950 to 1960 when the territory's gross national product (GNP) more than doubled.<sup>381</sup> Throughout this growth and industrialization period from 1948 to the early 1970s, Puerto Rico's real

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376. *See id.* (describing differences between section 936 and section 931). Under section 936, a credit was given for taxes on possession income instead of an exemption. *See id.* (noting also that dividends could be repatriated to United States without paying taxes on them).

377. DIETZ, *supra* note 3, at 301. One commentator noted that [i]n order to qualify as a corporation entitled to the tax benefits of Section 936 . . . specific requirements need to be complied with. A 936 corporation must: (1) be a corporation organized under the laws of a state of the United States; (2) meet an 80% and a 50% gross income test similar to the ones required under its predecessors; and (3) make a positive election to be treated under the provisions of section 936.

*Id.*

378. *See id.* at 301-02 (discussing desired benefits of section 936). There are three intended benefits of section 936: "an expansion of productive investment on the island; a reduction in the frequency of plant liquidations at the end of the tax-exempt period, by permitting immediate repatriation of profits with only a small penalty; and an increase in the commonwealth government's revenues through the toll-gate tax." *Id.* In order to achieve its purposes, section 936 contained several differences from section 931. *See* Hernandez-Ruiz, *supra* note 349, at 133 (noting that in order to claim exemption under section 936 "corporation must (1) be a corporation organized under the laws of a state of the United States; (2) meet an 80% and a 50% gross income test similar to the ones required under its predecessors; and (3) make a positive election to be treated under the provisions of section 936").

379. *See* DIETZ, *supra* note 3, at 243 (discussing initial impression of Operation Bootstrap).

380. *Id.* at 244.

381. *See id.* (describing economic conditions). The gross national product (GNP) grew at an average annual rate of 8.3%. *See id.* (noting that in next decade GNP grew at even higher average annual rate of 10.8% of each year). Also, between 1948 and 1966, per capita income increased from \$376 to \$900 in constant 1965 dollars, the labor force increased from 663,000 to 769,000 and employment rose from 589,000 to 680,000. *See* Davidson, *supra* note 348, at 112-13 (discussing economic growth and industrialization that resulted from 1948 Incentives Act).

GNP grew at a higher rate than that of the United States.<sup>382</sup> Puerto Rico's economic transformation was characterized as an "economic miracle."<sup>383</sup> This economic miracle allowed the NPP and its industrial architect Muñoz Marin to gain great support and power in Puerto Rico, which consequently allowed for the further entrenchment of the commonwealth status.<sup>384</sup>

Like the U.S. economy, by the mid-1970s Puerto Rico's economy had weakened substantially. While much of this downturn has been attributed to the oil crisis and ensuing worldwide recession, internal factors also contributed to the problems.<sup>385</sup> Puerto Rico had lost several key advantages as a producer for the U.S. market.<sup>386</sup> For example, as an indirect result of industrialization, Puerto Rico lost its wage advantage to other nonindustrial neighboring coun-

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382. See Davidson, *supra* note 348, at 112 ("From 1948 through the early 1970's, Puerto Rico's real GNP increased at a higher rate than that of the U.S. . . .").

383. See *id.* ("Puerto Rico's economic growth during the period was an 'economic miracle.'" (quoting U.S. DEPT. OF THE TREASURY, FOURTH ANNUAL REPORT OF THE OPERATION AND EFFECT OF THE POSSESSIONS CORPORATION SYSTEM OF TAXATION 23, 33 (1983))).

384. See generally DIETZ, *supra* note 3, at 241 (describing evolution of Puerto Rico's industrialization strategy). One commentator noted that

[p]lanning has revolved around the issue of what is necessary to attract external capital to the island rather than around the issue of Puerto Rico's needs. This did not happen because Fomento, Muñoz, and the PPD wished to benefit U.S. companies at the expense of local capital or to subject the local economy to external control, but because they believed that Puerto Rico's needs would be met by attracting U.S. capital, which was required for rapid growth, generation of employment, and an improved standard of living.

*Id.*

385. Compare Davidson, *supra* note 348, at 114-15 ("The Puerto Rican economy, which had grown very rapidly in the 1950s and the 1960s under Operation Bootstrap, displayed very slow growth in the years between 1973 and 1977. This declaration was brought about by the oil crisis and ensuing worldwide recession."), with PANTOJAS-GARCIA, *supra* note 3, at 144-45 (attributing slowdown of Puerto Rican economy to increase in cost of Puerto Rican wages, energy and shipping).

386. See PANTOJAS-GARCIA, *supra* note 3, at 144 (describing severity of economic crisis in Puerto Rico in mid-1970s). This crisis was more serious than a normal, cyclical downturn of a capitalist economy. See *id.* (stating crisis could not be fixed through policy changes but only through restructuring of Puerto Rico's economy). Among other key advantages lost by Puerto Rico, the cost of maritime transportation increased in the early 1970s. See *id.* (describing increases in maritime shipping costs).

tries.<sup>387</sup> In addition, Puerto Rico's energy costs were also substantially higher than that of the United States.<sup>388</sup>

Although Operation Bootstrap's private investment incentive programs successfully transformed a struggling agrarian economy to a rapidly growing industrial economy, the overall results of section 931 and section 936 were less favorable for Puerto Rico's economy than anticipated.<sup>389</sup> For example, "[t]he rate of productive investment rose 14.5% in 1976 but only 7% in 1980."<sup>390</sup> In addition, section 931 and section 936's initiatives did "little to boost investment, output, or employment."<sup>391</sup> During the 1940s, prior to Operation Bootstrap, unemployment rates in Puerto Rico hovered around fifteen percent. Since section 936's reform, unemployment rose to twenty-three percent in 1983<sup>392</sup> and is currently hovering again at fifteen percent. This resulted despite the substantial migration from Puerto Rico to the United States throughout the same period.<sup>393</sup> Other indicators also suggest minimal overall economic improvement; for example, gross fixed investment as a percentage of GNP was actually higher in 1950 than it was in the early 1980s, and the net contribution to GNP from manufacturing was 13.9% in 1950 and only 14.9% in 1982.<sup>394</sup> Even the U.S. Treasury Department admitted that "there is little evidence that the increase in funds has had any significant effect on the total availability of

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387. *See id.* (discussing differences in average hourly wage in Puerto Rico and United States). Although the difference between wages in Puerto Rico and wages in the United States increased from 1960 to 1970, the average Puerto Rican wage was still higher than that of its international competitors. *See id.* In 1970, the average wage in Puerto Rico for manufacturing was \$1.78, but in 1969 the average wage for similar industries was sixty-six cents in Mexico, twenty-three cents in other Caribbean countries and thirty cents in Asian countries. *See id.*

388. *See id.* at 145 ("By 1976 the average annual electricity bill for industrial establishments in Puerto Rico was 31 to 120 percent higher than in the United States . . . . On average the cost of energy to industries in Puerto Rico was between \$700 and \$3,390 a year higher, depending on consumption volume.").

389. *See* DIETZ, *supra* note 3, at 303 (discussing disappointing results of section 936). The profits made by the possessions corporation have not been reinvested into Puerto Rico but instead into financial assets. *See id.* (noting also that, although Puerto Rico's economy was in crisis, external investors were still reaping large profits).

390. *Id.*

391. *Id.* For supporting statistical data, *see id.* at 288-91.

392. *See id.* at 275 (displaying statistics table on labor force, participation rate and unemployment from 1940 to 1983).

393. *See id.* at 226-28, 282-85 (describing urbanization and migration into cities as result of industrialization and effects on population growth).

394. *See id.* at 257 (including table entitled "Total and Net Contribution to GNP from Manufacturing, 1950, 1960, 1970, 1980, and 1982").

credit, or long-term interest rates, in Puerto Rico.”<sup>395</sup> More recently, during recent congressional hearings on the status question, Representative Don Burton, of Indiana, stated:

Since the 936 program was started, we have spent about \$3,000,000,000 on that program, and the manufacturing sector in Puerto Rico is around 100,000 jobs, approximately the same number today as when 936 was created back in the 1970's.

...

Today, the unemployment figure in Puerto Rico is pretty close to the same figure that it was when 936 tax credits started, and the tax credits have increased by over 200 percent in the last 15 years.<sup>396</sup>

Despite the somewhat disappointing economic results of the legislative initiative, Puerto Rico maintained an appearance of economic stability through other U.S.-based economic efforts.<sup>397</sup> One Puerto Rican economist attributes this appearance to the U.S. government's other efforts at subsidizing the Puerto Rican economy. He noted that “Puerto Rico is living today under a mirage of economic affluence.”<sup>398</sup> According to this economist and others, “[f]ederal expenditures in, and federal transfer payments to, [Puerto Rico] have been the key to sustaining this illusion.”<sup>399</sup>

Overall, the Puerto Rican model of development achieved real economic gains for the people of Puerto Rico because of U.S. public and private investment.<sup>400</sup> Standing on its own merits, however,

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395. Gregorio Igartua, *U.S. IRC Section 936: A Tax Policy Analysis Within The P.R. Perspective*, REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO 109, 129 (1991).

396. *Plebiscite Joint Hearing*, *supra* note 17, at 45 (statements of Rep. Burton).

397. See DIETZ, *supra* note 3, at 297 (describing role of federal funds in Puerto Rican economy as well as new U.S. tax laws). The federal government by the early 1980s was transferring almost \$900 per person in income to Puerto Rico to maintain the average standard of living. See *id.* at 298 (noting, however, that although transferred money helps maintain standard of living, it does not stimulate production which would lower unemployment levels).

398. *Id.* at 297.

399. See *id.* (discussing federal transfer payments effect on Puerto Rico). Federal transfer payments to Puerto Rico accounted for 12% of personal income in Puerto Rico in 1950, 20% in 1970 and 30% in 1980. See *id.* at 297-98 (noting percentage of personal income comprised of transfer payments in United States was only half that of Puerto Rico).

400. See *id.* at 308 (“[I]ncomes and the standard of living [in Puerto Rico] . . . are well above almost every country in Latin America.”); cf. Igartua, *supra* note 395, at 129-31 (noting I.R.C. section 936 had some positive effects even though tax policy did not work as well as anticipated).

Operation Bootstrap's tax-based incentives did not achieve the purposes of sufficient employment, adequate investment and amelioration of poverty.<sup>401</sup> Irrespective of its economic success, the fact remains that as a result of Operation Bootstrap, Puerto Rico's economy became critically dependent on private U.S. investment and, in turn, virtually ensured that Puerto Rico's colonial status would not change.<sup>402</sup>

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401. See DIETZ, *supra* note 3, at 309 ("Operation Bootstrap . . . is a monument not to economic progress but to the costs and dangers inherent in a development program based upon capital-intensive, foreign-owned, vertically integrated, and export-oriented corporate expansion.").

402. The widely held belief both in the United States and Puerto Rico was that, because of U.S. constitutional constraints under the Uniformity Clause and potential political opposition in the United States concerning discriminatory tax treatment as a state, the tax incentives under Section 936 could only survive with commonwealth status. Cf. Deutch, *supra* note 89, at 686-89 (introducing issue of uncertainty concerning effect Puerto Rican statehood would have on tax exemption policy in light of Uniformity Clause). Article I, Section 8, Clause 1 of the U.S. Constitution, commonly known as the Uniformity Clause, provides in pertinent part: "Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

Up until recently it was believed both in the United States and Puerto Rico that section 936's tax incentives would only be available under the commonwealth status because the Uniformity Clause was interpreted to mean that states should not be taxed in a discriminating manner. See, e.g., *Knowlton v. Moore*, 178 U.S. 41, 84 (1900) ("[W]herever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."). More recently, the Supreme Court declared that Congress could enact tax legislation in express geographic terms, after ascertaining the existence of a geographically isolated problem. See *United States v. Plasynski*, 462 U.S. 74, 84 (1983) ("We cannot say that when Congress uses geographic terms to identify [the subject of a tax], the classification is invalidated. The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems."). This decision has led the Congressional Research Service to conclude that even if Puerto Rico was to become a state, section 936 could remain in effect during a transition period. Memorandum from American Law Division to the Honorable Bennett Johnston (May 30, 1989), reprinted in 2 PUERTO RICO: POLITICAL STATUS REFERENDUM, *supra* note 299, at 120 (discussing "validity of Congressional Deviation from Uniformity Requirement of Federal Taxation Respecting Puerto Rico in the Event of Statehood"). This conclusion, however, is far from uniformly accepted by other legal authorities. See Deutch, *supra* note 89, at 708-10 (noting opposing views of Professor Tribe, who construed *Plasynski* narrowly, and Professor Gewirtz, who construes *Plasynski* broadly).

Even if section 936 were constitutionally permissible under Puerto Rican statehood, section 936's incentives were doomed for political reasons. In fact, the recent legislative efforts at addressing the status question sought to repeal section 936 if statehood became the Puerto Rican people's choice. See *id.* at 710, 713 (noting that under senate bill, section 936 would be phased out over several years if Puerto Rico elected statehood). Representatives balked at the potential of discriminatory tax treatment for a state.

C. *The Worst of All Possible Scenarios: The Existence of Second-Class Citizenship and the Repeal of Section 936*

Congress, to the detriment of Puerto Rico, has resolved the section 936 debate. Although recent congressional action concerning section 936 demonstrates the United States's almost complete disregard for the plight of the Puerto Rican people, this solution may actually help resolve the territory's colonial dilemma. Over the last few years, both President Clinton and Congress have made proposals to repeal or substantially amend section 936.<sup>403</sup> The President's proposal provided for a new wage credit for possession corporations, but Congress's version, House Bill 3448, merely provided for a gradual phaseout of the income tax exclusion.<sup>404</sup>

On August 20, 1996, the President signed into law House Bill 3448, the "Small Business Job Protection Act of 1996,"<sup>405</sup> which contained a provision repealing section 936.<sup>406</sup> In his statement on the new law, the President expressed concern over "the repeal[ ] . . . [of a] tax credit related to corporate investments in Puerto Rico and other insular areas."<sup>407</sup> The President further stated: "[T]his legislation ignores the real needs of our citizens in Puerto Rico, ending the incentive for new investment now and phasing out the incentive for existing investments."<sup>408</sup> Under the new law, section 936's tax exclusion will be completely phased out within ten years.<sup>409</sup> For corporations currently qualifying and operating as possession corporations, the law begins to phase out the source in-

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403. See Robert S. Griggs, *Proposals in the U.S. Congress, by the President and by the Governor of Puerto Rico, Relating to the Future of the Section 936 Credit* (visited on Sep. 30, 1997) <<http://www.mcvpr.com/docs/proposa.html>> (discussing different options presented to Congress regarding section 936). This article, published by the law firm of McConnell Valdés, briefly explains the differences between Congress's proposed repeal of section 936, President Clinton's proposed amendments to section 936 and the Puerto Rican Governor's proposed alternative tax program.

404. See *id.* (describing President's proposal and Congress's bill).

405. Pub. L. No. 104-188, 110 Stat. 1755 (1996) (codified in scattered sections of 26, 29 and 42 U.S.C.).

406. See *Statement by President Clinton on the Job Protection Act*, U.S. NEWswire, Aug. 20, 1996, available in 1996 WL 5623434 (describing President Clinton's views, both positive and negative, on Small Business Job Protection Act of 1996).

407. *Id.*

408. *Id.*

409. H.R. CONF. REP. NO. 104-737, at 288-89 (1996) (reporting purpose and details of section 1601 of Small Business Job Protection Act of 1996 as well as details of previous versions of this section). Section 1601(j)(3)(A)(i) of the Small Business Job Protection Act of 1996 will provide that for an existing credit claimant "the credit under subsection (a)(1)(A) shall be allowed for the period beginning with the first taxable year after the last taxable year to which subparagraph (A) or (B) of paragraph (2), whichever is appropriate, applied and ending with the last taxable year beginning before January 1, 2006." *Id.* at 76-77.

come credit by providing for a cap beginning in 2002 and abolishing it altogether by January 1, 2006.<sup>410</sup>

The Puerto Rican economy is dependent on section 936 and its demise may devastate the territory's economy.<sup>411</sup> Although Congress and the President have expressed concern, they have failed to prevent the impending plight of America's second-class citizens.<sup>412</sup> This unilateral decision by the United States undermines the Puerto Rican economy and is but the most recent example of U.S. exploitation of its colonial possession.<sup>413</sup> Congress cared so little about the well-being of the Puerto Rican people that it subsidized federal incentives to the United States's small businesses by undermining Puerto Rico's economic backbone.<sup>414</sup> Although 3.7 million

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410. See *id.* at 80-81 (publishing context of I.R.C. section 30A(a) and section 1601 of the Small Business Job Protection Act of 1996); H.R. REP. NO. 104-586, at 132 (1996) (explaining section 1601 of Small Business Job Protection Act, section 936 and new I.R.C. section 30A, which deal with phased out Puerto Rican possession tax credit).

411. Although it may be premature to ultimately predict that economic strife will be caused by the phaseout of section 936, recent events such as the slowing down of Puerto Rico's manufacturing center and the downsizing of large corporations such as Motorola are solid indicators of the impact of this legislative decision. See *Wage-Hike Plan Could Cost Thousands of Puerto Rican Jobs, Politicians Say*, ORLANDO SENTINEL, May 26, 1996, at A14 ("Opponents contend thousands of jobs will be lost in Puerto Rico . . . at a time when increased competition from Mexico pays lower wages and enjoys easy access to the U.S. market.").

412. See 1996 Hearings, *supra* note 14, at 1-4 (statement of Rep. Don Young) (discussing purpose of hearings and stating Congress looking out for best interests of Puerto Rico and United States); *Puerto Rico's Section 936 Crisis*, CARIBBEAN UPDATE (Caribbean UPDATE, Inc., Maplewood, N.J.), Apr. 1993, at 1 (stating Puerto Rico and other Caribbean Basin nations would "suffer from the demise of Section 936"); *Statement by President Clinton on the Job Protection Act*, *supra* note 406 (statement of Pres. Clinton) (expressing concern regarding effect of Small Business Job Protection Act of 1996 on Puerto Rico). The Puerto Rican USA Foundation criticized proposals to repeal or reduce the effects of section 936. See *Puerto Rico's Section 936 Crisis*, *supra*, at 2 (relying on 1991 Price Waterhouse study concluding section 936's repeal "would have devastating consequences for the Puerto Rican economy, including a loss of at least 70,000 jobs, doubling the island's unemployment rate").

413. See 1996 Hearings, *supra* note 14, at 24 (statement of Rep. Kennedy). Representative Kennedy stated that

[w]e routinely change the relationship between the United States and Puerto Rico. The latest example is the proposed elimination of 936, which is one of the most fundamental elements of our relationship. And yet the people of Puerto Rico do not have a say in the United States Congress when it comes to these changes being made that directly affect their way of life here in Puerto Rico.

*Id.*

414. See *Plebiscite Joint Hearing*, *supra* note 17, at 15 (statement of Rep. Vasquez) (expressing dismay over idea that some Congressmen had decided Puerto Rico's economic future prior to hearings). Representative Vasquez stated that "[c]ontained in this year's Republican budget are radical changes in Section 936 and its plan of incentives for businesses. These actions speak louder than any rhet-

strong, the U.S. citizens in Puerto Rico are of little concern to the President or other congressional leaders because, as citizens of a colony, they have no voice in Washington. This cavalier disregard for so many people did not engender much congressional debate or newspaper headlines. People who spoke up for Puerto Rico merely acknowledged the lack of Puerto Rican representation.<sup>415</sup> The eloquent plea before Congress by Puerto Rico's nonvoting congressional delegate fell upon deaf ears:

Mr. Speaker, we are not aliens, we are not illegal residents, we are U.S. citizens. Fairness dictates that increased taxes on Puerto Rican-source income be also used for the benefit of the people of Puerto Rico. It is preposterous, indeed outrageous and unfair, that tax revenues collected on income earned in the Nation's poorest jurisdiction, Puerto Rico, be used to subsidize tax credits for small businesses in the 50 States of the Union, the poorest of which has more than double the per capita personal income of Puerto Rico.<sup>416</sup>

Ironically, Congress's callous dismantling of the foundation of the Puerto Rican economy may mobilize the Puerto Rican people to determine that U.S. colonialism in Puerto Rico has run its course. If the voice of justice and basic human dignity is no longer muzzled in Puerto Rico, change will be forthcoming. The Puerto Rican people will have likely had enough of the United States's false promises of self-determination after they realize how the U.S. government has shamelessly taken away, without consultation, the foundation for an economic incentive system and silenced them both economically and politically. The impending economic dislocation resulting from section 936's repeal, along with continued congressional delays in the development of a process to resolve the status question, will hopefully lead the Puerto Rican people to ap-

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oric about how this Congress feels about the 3.7 million American citizens in Puerto Rico." *Id.*

415. See 142 CONG. REC. S7409 (daily ed. July 8, 1996) (statement of Rep. Moynihan) ("[W]e must remain conscious of a very solemn responsibility to the people of Puerto Rico, who are not represented in this Chamber but who are American citizens."); 142 CONG. REC. H5438 (daily ed. May 22, 1996) (statement of Rep. Roth) ("I have to say something for people who cannot speak for themselves, and no one will speak for them on the floor of this House.").

416. 142 CONG. REC. H5304 (daily ed. May 21, 1996) (statement of Mr. Romero-Barceló); see 140 CONG. REC. S71 (daily ed. Jan. 25, 1994) (statement of Sen. Simon) (noting that Mr. Romero-Barceló was nonvoting member of Congress from Puerto Rico).



preciate the fallacy of a "free associated state."<sup>417</sup> The Puerto Rican statehood movement will likely gain even greater support in Puerto Rico as Puerto Rico's economy continues to suffer. In a time when the English-only movement is gaining currency in the United States, it remains to be seen if the Puerto Rican people, with their different culture, will be considered "fit" to become true American citizens.<sup>418</sup> The President, in turn, will likely once again call for congressional hearings to address the status question. If, however, the empire is exposed, then many in both the United States and Puerto Rico will demand self-determination for the Puerto Rican people. They in turn will demand the most basic of rights—that of choice—in Congress, in the U.N. and in the streets of the land that is supposed to be their own.

#### VI. SELF-DETERMINATION: AN ELUSIVE PROPOSITION FOR PUERTO RICO AND ITS PEOPLE

In reviewing the United States-Puerto Rico relationship, the evils of colonialism become apparent. Senator Ashcroft noted that colonialism is not only wrong because of its economic exploitation, but also because of its influence on culture.<sup>419</sup> He stated that colonialism is inconsistent with human dignity because it rewards passivity, encourages dependence and, instead of allowing people to determine their own fate, requires people to live by the rules of a distant elite.<sup>420</sup>

Since its genesis, the United States-Puerto Rico relationship has required the people of Puerto Rico to live by the rules set by the United States. The U.S. citizens of Puerto Rico have never attained the ability to freely determine their own political status. They have

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417. Cf. *Puerto Rico: Legislative Results Add to Governor's Big Win*, MIAMI HERALD, Nov. 7, 1996, at 26A (noting that most recent country-wide elections in Puerto Rico demonstrate peoples' growing disfavor with commonwealth status because Gov. Pedro Rosello was re-elected and his prostatehood party took majority of seats in both houses of Puerto Rican legislature).

418. See *Plebiscite Joint Hearing*, *supra* note 17, at 15 (statement of Rep. Vasquez) ("I wonder, with the current fervor of English-only on Capitol Hill, would Congress be willing to accept statehood as the choice of Puerto Ricans with Spanish as their official language?").

419. See 141 CONG. REC. S7245 (daily ed. May 23, 1995) ("The problem with imperialism was not just its economic exploitation. It was its influence on culture. It undermined traditional ways and institutions."). For a further discussion of Senator Ashcroft's statement, see *supra* notes 1-3 and accompanying text.

420. See 141 CONG. REC. S7245 (daily ed. May 23, 1995) (stating imperialism was not just attack on national sovereignty but also on national character). For a further discussion of Senator Ashcroft's statements, see *supra* note 3 and accompanying text.

never been free from foreign control.<sup>421</sup> Under the United States's tenure, the people of Puerto Rico have never attained the right to self-determination. They have epitomized a history of a people handed over by a sovereign, Spain, to another sovereign, the United States—an act which, according to Woodrow Wilson, is both unlawful and immoral.<sup>422</sup>

After conquering Puerto Rico, the United States set the terms in which Puerto Ricans were to live by first establishing a military government and then establishing a civilian colonial government. After Puerto Rico's political leaders time and time again demanded autonomy, the formal response, starting with President Roosevelt and continuing with President Clinton, was to order congressional or executive department hearings on the issue of Puerto Rico's status as a territory. Is understanding the nature of colonialism so difficult to comprehend?

Termed a "commonwealth," Puerto Rico is in actuality a colony. As defined in the dictionary, the term commonwealth implies autonomy.<sup>423</sup> In providing an example of such autonomy the dictionary mistakenly cites to Puerto Rico and states that "commonwealth" is "used to refer to a self-governing, autonomous political unit voluntarily associated with the United States."<sup>424</sup> As demonstrated above, Puerto Rico did not voluntarily associate with the

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421. Cf. Gordon, *supra* note 42, at 321-22 (discussing fundamental right to self-determination). The author states:

The right of a particular group of people freely to determine their own political, economic, cultural, and social systems seems to preclude outside forces from making or coercing these decisions because self-determination requires the absence of external domination. Thus, if self-determination currently means independence and freedom from all forms of foreign control, then trusteeship, which entails tutelage and dependence, is unacceptable.

*Id.* at 321.

422. Cf. OFUATEY-KODJOE, *supra* note 49, at 79-80 (discussing President Wilson's philosophical foundations for his self-determination theory). Wilson believed that people could not be transferred from one sovereign to another like property. See *id.* at 79 (noting Wilson instead believed in popular sovereignty which is right of all people to do as they wish with their own country and government). For a further discussion of self-determination, see *supra* notes 42-68 and accompanying text.

423. See AMERICAN HERITAGE DICTIONARY 299 (2d ed. 1982) (defining "commonwealth" as "[a] nation or state governed by the people" or as "[t]he official title of Puerto Rico, indicating its special status as a self-governing, autonomous political unit voluntarily associated with the United States"); see also Samuel Quiros, *The Status Quo: Without Dignity* (visited on Sept. 30, 1997) <<http://www.PuertoRico51.org/english/ela1a.htm>> (stating that term "commonwealth" implied autonomy).

424. See AMERICAN HERITAGE DICTIONARY 299 (2d ed. 1982) (defining commonwealth).

United States, and it is not an autonomous political unit and it is far from self-governing.<sup>425</sup> Puerto Rico is the booty of war and is under the plenary control of Congress under the Territorial Clause, sometimes referred to as the "territorial claws."<sup>426</sup> In terms of self-governance, the United States has merely agreed to allow the people of Puerto Rico to choose their own governor and establish a constitution addressing local matters. Even these limited rights given to the Puerto Rican people, as with rights granted by any parent state, including the right to establish a constitution, can be revoked by Congress.<sup>427</sup> One only has to look at U.S. actions to remove any doubt concerning this conclusion. When Puerto Rico adopted its constitution, Congress approved it only after it revoked certain provisions.<sup>428</sup> Eighty years after the acquisition of Puerto Rico, the U.S. Supreme Court, in *Harris v. Rosario*,<sup>429</sup> confirmed that Congress exercises essentially complete authority over Puerto Rico as long as there is a rational basis for its actions.<sup>430</sup> During recent deliberations concerning House Bill 3024, a House report admits that "the existing statutory authority for the current 'commonwealth' structure can be rescinded by Congress pursuant to the same Territorial Clause power exercised to create it in the first place."<sup>431</sup>

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425. See Quiros, *supra* note 423 ("Puerto Rico's association with the United States is anything but voluntary.").

426. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

427. See, e.g., Act of Mar. 2, 1917, ch. 145, 39 Stat. 951 (1917) (surviving provisions codified as amended at 48 U.S.C. §§ 742, 864, 858, 872 (1994)) (providing that any acts by Puerto Rican legislature can be annulled by Congress). For a further discussion of the rights of Puerto Rico, see *supra* notes 121-23 and accompanying text.

428. See Act of July 3, 1952, Pub. L. No. 447, 66 Stat. 327 (1952) (stating that sections of Puerto Rico Constitution shall have no force until amended). For a further discussion of the adoption of Puerto Rico's constitution, see *supra* notes 149-63 and accompanying text.

429. 446 U.S. 651 (1980).

430. See *Harris*, 446 U.S. at 651-52 ("Congress, which is empowered under the Territory Clause of the Constitution . . . may treat Puerto Rico differently from States so long as there is a rational basis for its action."). In addition, the Congressional Research Service found that absent recognition of fully equal citizenship status for people born in the territory, which is protected constitutionally in the same manner as nationality and citizenship arising from birth in one of the 50 states, the statutory citizenship of the people of Puerto Rico could be restricted, modified or withdrawn by Congress. See Memorandum from American Law Division to Honorable Bennett Johnston, *supra* note 402, at 84 (stating Puerto Ricans do not have Fourteenth Amendment citizenship).

431. H.R. REP. NO. 104-713, pt. 1, at 10 (1996).

Under relevant international law principles, Puerto Rico is clearly a dependent territory.<sup>432</sup> It is geographically separate and is ethnically and culturally distinct from the country administering it.<sup>433</sup> All other U.N. factors also support a finding of non-self-governance. As this and other works demonstrate, the historical, political, economic, juridical and administrative nature of the relationship between the United States and Puerto Rico typify dependence. As the first point of this Article sets forth, the legislative and judicial actions of the United States make abundantly clear that it has a power over Puerto Rico that is virtually unfettered.<sup>434</sup> For almost one hundred years, the United States has set almost every conceivable term and condition of Puerto Rican governance, ranging from the form of government to the powers of that government. Despite repeated pleas for autonomy, the United States has influenced the referenda processes and then only granted largely inconsequential rights. As for economic influence, the second tenet of this Article demonstrates that U.S. laws affecting taxation played an integral role in the transformation of the Puerto Rican economy from a weak agrarian economy to an entirely U.S.-dependent industrial economy requiring U.S. laws and colonial status to ensure stability.<sup>435</sup>

According to the principles set forth by the U.N. and accepted by the United States,<sup>436</sup> a non-self-governing territory can achieve self-governance through (1) independence, (2) integration with an independent state, or (3) free association. While the term "commonwealth status" translates in Spanish to "free association," under the U.N. doctrine, free association can only be attained freely and

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432. See G.A. Res. 1541, *supra* note 44, at 29 (listing principles which should guide determination of whether territory has attained "full measure of self-government"). According to the resolution, a territory which is geographically separate and ethnically or culturally distinct from the country administering it is one which has not yet attained a full measure of self-government. See *id.* A territory's status as one which has not yet attained a full measure of self-government is strengthened if the territory is arbitrarily placed in a position of subordination to the administering state. See *id.*

433. *Id.*

434. For a discussion of United States power over Puerto Rico, see *supra* notes 89-166 and accompanying text.

435. For a further discussion of role of U.S. laws in Puerto Rican economy, see *supra* notes 338-418 and accompanying text.

436. See G.A. Res. 2625, *supra* note 58, at 123 (stating U.N. members have duty to respect right of self-determination of all peoples); G.A. Res. 2200, *supra* note 77, at 52 (1966) (providing that self-determination is a right of all peoples); G.A. Res. 1541, *supra* note 44, at 29 (1960) (listing factors to be considered in determining whether territory is self-governing); G.A. Res. 648, *supra* note 60, at 33 (identifying means through which territory could attain self-governance).

on the basis of absolute equality.<sup>437</sup> Even Congress recently admitted that "Puerto Rico's current status does not meet the criteria for *any* of the options for full self-government under [U.N.] Resolution 1541."<sup>438</sup> Moreover, the General Assembly Resolution which recognizes that self-governance may be achieved through a free-association also recognizes that such a status should probably be a temporary one in which the dependent territory's peoples retain "the freedom to modify the status."<sup>439</sup> Clearly, after fifty years of a status that the Puerto Rican people have not been free to modify, there is no semblance of self-governance.

A review of the referenda undertaken in Puerto Rico further demonstrates that Puerto Rico has never attained free association. In the first referendum in 1951, pursuant to Public Law 600, the people of Puerto Rico merely had the option of choosing between disguised colonialism under the newly termed commonwealth status or old-fashioned naked colonialism. In the 1967 referendum, the will of the people was not freely exercised because the statehood and independence parties abstained from participating because of U.S. influence, and Congress refused to recognize the results of the referendum.<sup>440</sup> As evidenced by House Bill 3024, the 1993 plebiscite was rejected out of hand by Congress even before the results were tallied.

Thus, the United States has led much of the world in condemning colonial exploitation and yet remains forgetful about its own transgressions.<sup>441</sup> The United States, through the U.N., proclaimed to the world that Puerto Rico had attained autonomy, yet Puerto Ricans have had to ask for permission to even be allowed to vote on their future—a novel notion of autonomy.<sup>442</sup> The world, through the U.N. Charter, has proclaimed that the right and desire of a people to be allowed to decide their fate is a fundamental right. The people of Puerto Rico have had to beg Congress to state

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437. See G.A. Res. 1541, *supra* note 44, at 29 (providing that association must be free from colonial influence). For a discussion of free association, see *supra* notes 59-61 and accompanying text.

438. H.R. REP. NO. 104-713, pt. 1, at 14-15 (1996) (emphasis added).

439. See G.A. Res. 1541, *supra* note 44, at 29.

440. See CARR, *supra* note 117, at 94-95 (noting Congress ignored results of Puerto Rican referendum). For a discussion of Congress's influence on the referendum, see *supra* notes 196-279 and accompanying text.

441. See WAINHOUSE, *supra* note 7, at 138-39 (discussing demands of Puerto Rican people for change in island's political status). For a discussion of contradictions in U.S. policy, see *supra* notes 3-11 and accompanying text.

442. See TORRUELLA, *supra* note 9 at 138-39 (discussing demands of Puerto Rican people for change in island's political status). For a discussion of Puerto Rico's requests for autonomy, see *supra* notes 196-279 and accompanying text.

"the specific status alternatives that [Congress, as an arm of the colonial ruler] is willing to consider, and the measure it recommends the people of Puerto Rico should take."<sup>443</sup> Can this in any way truly be considered anything other than the subjection of a people to alien subjugation and domination?<sup>444</sup> Even as this Article is being written, Congress is denying the Puerto Rican people the right to self-determination by exclusively deciding the terms and conditions for the next vote the Puerto Rican people will be allowed to take in an effort to determine their own freedom.<sup>445</sup>

The United States must allow the people of Puerto Rico to exercise the fundamental right of self-determination. As the country responsible for the development of the self-determination right and as a signatory to the U.N. Charter, the United States should live up to "its duty to promote . . . realization of the principle of equal rights and self-determination. . . ."<sup>446</sup> Abiding by the principles set forth in the U.N. Charter, as well as a host of U.N. resolutions, the United States must ensure that the Puerto Rican self-determination referendum process be well-informed and unbiased.<sup>447</sup> Accordingly, the result of the referendum process must be an expression of the people's free will, notwithstanding certain support for the wholly impracticable and almost undefinable "free association" concept. Only through independence or full integration can there be an end to colonial dominance.

In conclusion, the United States-Puerto Rico relationship is one of domination and undue foreign political and economic influence. The United States, from the beginning of this relationship, has failed to allow the Puerto Rican people to attain the most basic of all rights: the right to choose their own political and economic future. It is truly shameful that it will have taken well over one hun-

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443. See 142 CONG. REC. E988 (daily ed. June 4, 1996) (statement of Rep. Gallegly) (describing measures Congress has taken to assist Puerto Rico in solving problem of its political status).

444. See generally 137 CONG. REC. H4540 (daily ed. June 13, 1991) (statement of Rep. Serrano) (noting that vestiges of colonialism still prevail in Puerto Rico). For a discussion of requests for Congress to clarify the political status of Puerto Rico, see *supra* notes 196-279 and accompanying text.

445. See *Plebiscite Joint Hearing*, *supra* note 17, at 53 (statement of Ruben Berrios-Martinez) ("Puerto Ricans should be told the truth concerning their present status, that commonwealth is a colonial status . . . and that Congress could only enter into a bilateral pact with a separate sovereign body politic. If Congress fails to speak clearly, the result will be the continuation of colonialism by inertia . . .").

446. G.A. Res. 2625, *supra* note 58, at 123.

447. See, e.g., G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, para. 2, U.N. Doc. A/4684 (1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.").

dred years, if ever, for the United States to allow the people of Puerto Rico to realize the virtues of human dignity and implement the sacred right of self-determination.<sup>448</sup>

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448. With more than a touch of irony, the author wishes to proudly acknowledge being a citizen of a country, albeit through the consequences of colonialism, where he can scathingly critique that country's colonial practice and yet not fear political persecution.

A mi querida viejita: Me da tanta pena que nunca pude leerte este artículo y la dedicación, pero se que en el cielo, estaras leyendo este mensaje y estaras muy orgullosamente diciendole a todos los angeles que lindo es tu hijo. Gracias mami. Espero algun dia, si Dios quiere, volver a abrazarte. [To Mom: It makes me very sad that I never read this article and its dedication to you, but I know that you will be getting this message in heaven and you will be proudly telling all the angels what a lovely son you have. Thanks, mom. I hope someday, God willing, I will hug you again.]

